92-1670

NO.

Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

CLIFFORD FERGUSON, Petitioner

v

THE UNION CITY DAILY MESSENGER and
DAVID BARTHOLOMEW, Respondents

PETITION FOR WRIT OF CERTIORARI TO THE TENNESSEE SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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THE QUESTIONS PRESENTED FOR REVIEW

1. Whether a sworn affidavit of one of the Respondent's co-workers stating that the Respondent constantly discussed the Petitioner in a negative manner, often mentioned the Petitioner's possible removal from office, and clearly wanted the Petitioner removed from office, presents a genuine issue of material fact as to whether the Respondent with the requisite malice published defamatory articles about Petitioner that resulted in his removal from office.

2. Whether the Tennessee Supreme Court was in error in holding that there was no genuine issue of material fact in the record as to whether the Respondents published defamatory statements with the requisite degree of fault required by this Court in New York Times v. Sullivan, 376 U.S. 254 (1964).

3. Whether the Tennessee Supreme Court was in error in holding that there was no genuine issue of material fact regarding whether the Petitioner was a public figure.

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the Tennessee Supreme Court.

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OPINIONS BELOW

1. The November 30, 1992, opinion of the Tennessee Supreme Court, whose Judgment is herein sought to be reviewed, although designated for publication, has yet to be reported and is reprinted in the separate Appendix to this Petition, at Page 1. The prior opinion of the Court of Appeals of Tennessee, Western Section, is unreported and is likewise reprinted in the Appendix to this Petition at Page 22. A written transcript of the oral ruling announced by the Circuit Court of Obion County is also reprinted in the Appendix to this Petition at Page 43.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The judgment of the Tennessee Supreme Court was entered on November 30, 1992. On December 10, 1992, Petitioner filed a petition to rehear in the Tennessee Supreme Court, which was denied on January 17, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the second section of the First Amendment to the Constitution of the United States, which provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

STATEMENT OF THE CASE

This defamation action was initiated on January 29, 1988 in the Circuit Court for Obion County, Tennessee, at Union City by the Petitioner, Clifford Ferguson (hereinafter referred to as "Petitioner" or "Mr. Ferguson"). Mr. Ferguson's complaint alleged that the Respondents, the Union City Daily Messenger (hereinafter referred to as "Messenger"), and David Bartholomew (hereinafter referred to as "Bartholomew") intentionally and maliciously defamed Mr. Ferguson by virtue of numerous newspaper articles published by the Respondents.

On January 10, 1990, both parties appeared before the Circuit Court for Obion County to argue a Motion for Summary Judgment filed by the Respondents. The motion was heard on memoranda of counsel and the entire record in the cause, which included the depositions of all parties and numerous affidavits filed on various factual issues.

At the close of lengthy oral arguments of both counsel, the Circuit Court Judge announced his decision orally from the bench. According to the trial judge, Mr. Ferguson was not entitled to maintain his action for defamation on the grounds that he was a public official and the evidence before the court did not show actual malice with convincing clarity. (January 10, 1990, Ruling Page 4, 6).

On July 2, 1991, the Tennessee Court of Appeals, Western Section, entered an Order and filed an opinion reversing the trial court's ruling with regard to Mr. Ferguson's defamation action against both Respondents on the grounds that there was a genuine issue as to whether Mr. Ferguson was a public figure. The Tennessee Supreme Court, on November 30, 1992, reversed this ruling of the Tennessee Court of Appeals, and affirmed the initial granting of the Summary Judgment by the Circuit Court for Obion County.

Petitioner Clifford Ferguson's employment

with Obion County began on October 17, 1978, when Obion County Judge T. W. Jones hired him as the "Director of Accounts and Budgets." This position was designated in the county budget to serve in the Department of the County Judge. In 1979, the Obion County Commission adopted the Financial Management Act. As a part of the Act, a Finance Department was created as a separate line item in the Obion County budget. The Finance Department was directed by a seven person committee which appointed Mr. Ferguson the "Finance Director" of Obion County. Once appointed to this position, Mr. Ferguson hired Mrs. Vickie Graham to serve as his Secretary within the Finance Department.

The County Commission adopted The Financial Management Act to centralize the bookkeeping of Obion County; however, because the County Board of Education successfully brought suit against the county to be excluded from the centralized bookkeeping, it never

came to fruition. Nevertheless, Mr. Ferguson continued to serve as the "Finance Director" for any county department that voluntarily subjected its finances to the now defunct "Finance Department."

In June of 1983, the Budget Committee of the Commission recognized that due to the Board of Education's suit, the "Finance Department" no longer legally existed. As a result, it decided to place Mr. Ferguson's position back under the Office of the County Executive. In July of 1983, the County Commission approved the county budget wherein the "Finance Department" was deleted and Mr. Ferguson's position was listed as "Purchasing Agent" under the authority of the County Executive's Department. At the time that Mr. Ferguson's position was moved into the County Executive's Office, Mrs. Vickie Graham, his Secretary in the former "Finance Department," was also moved. From that point on, Mr. Ferguson never instructed Mrs. Graham to

perform any tasks, as he did when she was his Secretary in the "Finance Department." The two worked as co-employees and any instructions she received came from their supervisor, County Executive Jarvis.

Mrs. Graham left her employment with the county in June of 1984, and Mr. Ferguson was not allowed any input into the decision of who would replace her. In fact, when Mr. Ferguson told Jarvis of the availability of two qualified applicants, Jarvis told Mr. Ferguson that he would have nothing to do with the hiring of the replacement. The individual eventually hired by County Executive Jarvis was Ms. Treva Bond. Ms. Bond was never instructed by Mr. Ferguson as to what her duties were to be, nor did Mr. Ferguson treat Ms. Bond as his secretary. Likewise, County Executive Jarvis never informed Mr. Ferguson of Ms. Bond's exact duties. Ms. Bond and Mr. Ferguson worked together only as co-employees, and Mr. Ferguson did not learn what Ms. Bond's

exact duties were until State Auditors asked the county for job descriptions to detail the duties of each county employee. It was clearly listed in Ms. Bond's job description that the paying of county bills was her duty.

As Purchasing Agent for Obion County, Mr. Ferguson was only responsible for the purchasing procedures of the counties; he was not responsible for the paying of county bills. In fulfilling his responsibilities as Purchasing Agent, Mr. Ferguson followed the purchasing procedures set out in the Tennessee State Statutes. This procedure basically required Mr. Ferguson to send out letters seeking bids, choose the lowest bid submitted, and then send a purchase order to the vendor with the lowest bid. When the county placed an order to purchase goods or services, it was Mr. Ferguson's responsibility to forward a purchase order form to the vendor. On the form, the vendor was instructed to send the bill to the Purchasing Department.

When the bills from various vendors were received, it was Ms. Bond's responsibility to match the bill with the correct purchase order. Ms. Bond was then to fill out a "warrant," (a check) and have both Mr. Ferguson and County Executive Jarvis sign the check. Once both men signed the check, Ms. Bond was responsible for sending it to the vendor by placing the check in the mail.

Respondent David Bartholomew was at all times pertinent, a reporter or editor of the Respondent Union City Daily Messenger, the only newspaper published in Obion County, Tennessee. Among Mr. Bartholomew's duties with The Messenger was the reporting of the activities of Obion County government. In fact, Mr. Bartholomew held himself out to the citizens of Obion County as their "eyes and ears in county government."

Bartholomew was present at the County Commission meeting when Mr. Ferguson was initially hired by the Obion County

government. From that time forward, Bartholomew regularly attended the Commission meetings at which Mr. Ferguson was also present. Furthermore, Bartholomew also came into contact with Mr. Ferguson once or twice a week at the county courthouse.

At least until 1984, whenever Bartholomew would leave the Messenger newsroom to attend a Commission meeting, he would stop by the desk of a co-worker, Ms. Jean Green, and state in a loud voice, "they are going to fire your friend today," a reference to Mr. Ferguson. From the time that Mr. Ferguson began work with the county, Bartholomew had only negative things to say about him in the Messenger Newsroom. In fact, Bartholomew clearly wanted Mr. Ferguson removed from office. (See Affidavit of Jean Green attached in the Appendix, at page 61.)

Defendant Bartholomew read the Obion County Budget each year. The budgets for the fiscal year July 1, 1980, to June 30, 1981,

and July 1, 1982 to June 30, 1983, contained separate budget entries for the department of "Financial Administration." Included in the department were line items for the director's salary, the assistant director's salary, and the secretary's salary. However, the budget for fiscal year, July 1, 1983, to June 30, 1984, showed that there was no longer a salary apportioned for the director of "Financial Administration," but rather there was a salary for a "Purchasing Agent" in the Office of the County Executive. Also included in this budget was a line item under the County Executive's Office for a secretary. Other subsequent budgets contained similar entries.

Despite having knowledge of this information, Bartholomew in all or most of his post 1983 articles concerning county finances, consistently continued to refer to Mr. Ferguson as "Finance Director," or "Director of Accounts and Budgets," rather than the "Purchasing Agent" title shown in the county

budgets with which Mr. Bartholomew were intimately familiar. In addition, Mr. Bartholomew frequently referred to the defunct "Department of Finance," depicting Mr. Ferguson as the individual in charge of the non-existent department.

In March of 1985, Mr. Ferguson was hospitalized, leaving Ms. Bond in the office alone. Subsequently, Mr. Ferguson returned and in the summer of 1985, Ms. Bond took a maternity leave of absence. During this time, Mr. Ferguson discovered unpaid bills of the county in a folder turned backwards in a file drawer. He immediately brought this to the attention of County Executive Jarvis, who refused to do anything about this situation. In fact, Mr. Jarvis told Mr. Ferguson that he did not want to discuss the matter now or ever again. Having no authority to do more, and having brought the problem to his supervisor's attention, Mr. Ferguson felt he could do nothing else concerning Ms. Bond's failure to

properly administer and mail the above-described checks. The only individual with the authority to terminate Ms. Bond's employment was County Executive Jarvis.

In January of 1987, Mr. Ferguson once again found bills that should have been paid in late 1986. Furthermore, he also found certain invoices and checks which were signed by both he and County Executive Jarvis, randomly scattered throughout the office which he and Ms. Bond shared.

In January of 1987, it was discovered that the credit extended to Obion County by state agencies in Nashville had been cut off due to the fact that an invoice issued to the Obion County Sheriff's Department had not been paid. In covering the Sheriff's Department, Bartholomew had become personally acquainted with the Sheriff. During the Commission meeting in January, the Sheriff's Department was reprimanded for making purchases without submitting a purchase order to Mr. Ferguson.

After the meeting, Bartholomew stated to Mr. Ferguson, "Well, you have won another one."

On or about January 29, 1987, Defendant Bartholomew interviewed Mr. Ferguson about the past due bills from late 1986. This questioning was conducted in a belligerent and accusatory manner, and during the interview Bartholomew accused Mr. Ferguson of having a "sweetheart" deal with one of the vendors.

In the January 30, 1987, edition of The Messenger, a great deal of space was devoted to the failure of Obion County to timely pay its bills. The lead story in that issue, with the headline "County Bills Past Due As Suppliers Go Unpaid," discussed the cut-off of Obion County's credit by state agencies. The article referred to Mr. Ferguson as "Director of Finance and Purchasing" and referred to the "Department of Finance and Purchasing" as being Mr. Ferguson's office. The right half of the top of the edition consisted of a photograph depicting the bookkeeper of the

Defendant Messenger presenting past due bills to the "Director of Finance and Purchasing Clifford Ferguson." The lead story in that edition of the Defendant Messenger dealt with Obion County's failure to timely pay its bills, along with its day-to-day handling of various financial affairs.

In addition to these stories and photos, additional stories and graphs appeared on Page 7 of the Messenger. All of the reports at issue were authored and/or coordinated by The Messenger Editor, Respondent Bartholomew. Along with the lead story on the front page of The Messenger, another photograph and an article entitled "Ferguson says, paid as received," appeared on the front page. This article referred to, "Clifford Ferguson, the man who writes the checks to keep Obion County going..." and also referred to, "...his department, that of Finance and Purchasing...." The accompanying photograph depicted County Executive Jarvis signing a

check prepared by Ms. Treva Bond for payment of the invoices to The Messenger shown in the other photograph as being presented to Mr. Ferguson. The caption to the photograph referred to Ms. Bond as the "Secretary in the Department of Finance and Purchasing," and also referred to "her boss, Department Director, Clifford Ferguson."

The Respondent Messenger allowed these incorrect titles to be printed in this edition, despite the fact that its Editor and Chief Reporter, Respondent Bartholomew, had previous knowledge that Ms. Bond was not a secretary in the "Department of Finance," and that she was not under the supervision of Mr. Ferguson, but in fact County Executive Jarvis was her superior.

On Page 4 of the January 30 edition, an editorial authored by Bartholomew appeared. The editorial was entitled "Action Warranted," and dealt with the failures of the Obion County Financial Management System and the

opinion that the county-wide financial management system no longer "made sense." Page 7 of this same edition was also devoted entirely to this issue, with four or five articles constituting one-half of the page, and reproductions of documents taking up the remaining one-half page. These articles continued to refer to Mr. Ferguson as "Director of Financing and Purchasing," as well as to the "Department of Financing and Purchasing." In addition to the references concerning Mr. Ferguson in the articles, some of the documents reproduced also contained his name or references to his alleged position.

In May of 1987, a representative of a local electrical company met with County Executive Jarvis to discuss the non-payment of certain bills submitted by the company to the county. Both Ms. Bond and Mr. Ferguson were called into this meeting, and it was at this meeting that Mr. Ferguson first learned of the non-payment of the electric bills. Since Mr.

Ferguson had signed the checks along with County Executive Jarvis, he had assumed that the checks were being mailed by Ms. Bond.

The May 22, 1987, edition of The Messenger contained the following headline in large red letters: "County Repeatedly Late Paying Utility Bills." Under the right half of the headline was a reproduction of another document, and under the left half of the headline was a story concerning the failure of the "Department of Finance and Purchasing," to pay the county utility bills. The story also referred to "Clifford Ferguson, Director of Finance and Purchasing and his Secretary, Ms. Treva Bond." The story mentioned that $250.00 in penalty fees had been assessed against the County for the failure to timely pay its utility bills.

Once it became apparent that Obion County was failing to timely mail payments for its bills, a committee was appointed by the Obion County Commission to investigate the problem.

In addition, County Executive Jarvis dismissed Ms. Bond in May of 1987. The committee was comprised of three members of the Budget Committee who met on three occasions in Mr. Ferguson's office. It was at one of the committee meetings held in Mr. Ferguson's office that members of the committee found unopened mail dating back to October of 1986 in Ms. Bond's desk. As a result of these meetings, the committee made a recommendation to the Commission to abolish the already non-existent "Finance Department." The committee made this recommendation despite the fact that the Committee Chairman, Jean Cohen, found that Mr. Ferguson had done nothing wrong in his job performance.

In late May of 1987, Bartholomew again interviewed Mr. Ferguson and Ms. Bond. During this interview, Ms. Bond stated that she would accept full responsibility for the unpaid bills and late checks. Moreover, Mr. Ferguson specifically informed Bartholomew that he had

found unpaid bills and completed checks in Ms. Bond's desk as early as 1985. Bartholomew was also told of Mr. Ferguson's futile attempts to have something done about this situation.

The headline story of the May 26, 1987, edition of the Defendant Messenger was entitled "Special Committee Finds Financial Woes." The article spent much time discussing Clifford Ferguson and contained further references to the "Department of Finance and Purchasing," and to Clifford Ferguson, "Director of Finance and Purchasing." The articles did not discuss the job descriptions ordered by the state auditors which were distributed in the presence of Defendant Bartholomew, and which conclusively demonstrated that Ms. Bond was responsible for the bill payment failures. They also did not mention the statements of Ms. Bond to Mr. Bartholomew that she would take full responsibility for the non-mailed checks. Lastly, they did not mention the fact known to

Respondent Bartholomew that the problem had occurred before, and that Mr. Ferguson had attempted to have County Executive Jarvis do something about it, but he had refused.

As a result of these articles, which stated that Petitioner Ferguson was responsible for the unpaid bills, and due to the resulting pressure brought to bear by Obion County constituents caused by the articles, members of the Obion County Commission forgot the 1983 vote to abolish the "Department of Finance," and again voted on June 8, 1987 to abolish the non-existent "Department of Finance." On June 30, 1987, Mr. Ferguson received a termination notice from Obion County Government.

THE RULINGS BELOW

Mr. Ferguson's original complaint filed in the Circuit Court for Obion County, Tennessee alleged intentional and malicious defamation on behalf of Respondents Bartholomew and the Messenger, and

specifically pled the actual malice requirement as enunciated by this Court in New York Times v. Sullivan, 376 U.S. 254 (1964).

As stated earlier, the Circuit Court granted the Respondents Motion for Summary Judgment as to the defamation action. Specifically, the Circuit Court Judge, who announced his decision orally from the bench, ruled that Petitioner Ferguson was not entitled to maintain his action for defamation on the grounds that he was a public official, and the evidence as presented by Mr. Ferguson did not show actual malice "with convincing clarity." (January 10, 1990, Ruling, Appendix at page 50) The trial court reached this result despite the existence of the sworn affidavit of Jean Green, which he never mentioned in his ruling and which emphatically stated that Respondent Bartholomew clearly desired the removal of Petitioner Ferguson from office and constantly spoke negatively about him.

Petitioner Ferguson timely filed a Notice of Appeal to the Tennessee Court of Appeals on May 29, 1990. In the brief supporting the appeal, Petitioner Ferguson initially questioned the trial court's ruling as to the dismissal of the defamation action. Petitioner Ferguson asserted that if Mr. Ferguson was not a public figure "he did present enough proof under the negligence standard to defeat the Motion for Summary Judgment," and that if he was a public figure "he presented enough proof of actual malice to defeat the motion." (Appellate Brief, at page 29.) Petitioner Ferguson's brief went on to discuss various Supreme Court decisions interpreting the actual malice standard, including Harte-Hanks Communications, Inc. v. Connaughton, 109 S.Ct. 2678 (1989) as well as Bose Corporation v. Consumers Union of United States, 692 F.2d. 189,196 (1st Cir. 1982), aff'd, 466 U.S. 493 (1984). Specifically, Petitioner noted that the Supreme Court in

Harte-Hanks found that circumstantial evidence of a defendant's state of mind may oftentimes be the only indication of whether the Defendant had actual malice when printing a defamatory article. Petitioner compared the instant case with that of Harte-Hanks, in that Respondent Bartholomew, like the Defendant in Harte-Hanks, "failed to verify his stories by checking documentation readily available to him that would have shed light on the controversy." (Appellate Brief, at page 34). Additionally, just as in Harte-Hanks, the Respondent Bartholomew had access to information which would have allowed him to "get to the bottom of the reason for the failure of Obion County to timely pay its bills." (Appellate Brief, at page 37). More importantly, the brief highlighted how Bartholomew actually knew the reason for the failure, the performance of Ms. Bond and the refusal of the County Executive to do anything about it, yet the articles blaming Mr.

Ferguson and his "department" were published. Mr. Ferguson's brief went on to discuss other facts and circumstances which could have led a jury to find actual malice on behalf of the Respondents, most notably the affidavit Jean Green. Also contained in Petitioner's brief to the Tennessee Court of Appeals was the allegation that Respondent Bartholomew's knowledge gained in the late May interviews with Ms. Bond and Mr. Ferguson "shows reckless disregard for the truth of statements" published by the Respondent Messenger in the late May issues. (Appellate Brief, at page 56).

The Tennessee Court of Appeals, in an opinion handed down on July 2, 1991, reversed the Circuit Court for Obion County, holding that the granting of summary judgment on the defamation claim was unwarranted. Unlike the trial court, the Tennessee Court of Appeals concluded that "there is a dispute as to whether Ferguson was responsible for seeing

that the bills of Obion County were paid." (Ct. of App. Opin., App. at page 35). According to the Court of Appeals, therefore, "there is a genuine issue of fact regarding the scope of Ferguson's responsibilities as Purchasing Agent, which is determinative of his status as a public official..." (Ct. of App. Opin., App. at page 36). Accordingly, since a party to a lawsuit has the right to have all disputed issues of fact decided by a jury, the Court of Appeals found that the determination of whether a Plaintiff in a defamation suit is a public official "is a question of law." (Ct. of App. Opin., App. at page 35). The Court of Appeals concluded that "the issue of Ferguson's scope of responsibilities must be determined before there can be an accurate decision as to whether he is a public official." (Ct. of App. Opin., App. at page 35-6.) Consequently, the Court of Appeals found that "Ferguson has a right to a jury trial on factual questions

involved in legal issues" and that "there is a genuine issue as to a material fact regarding the scope of Ferguson's responsibilities and summary judgment is not proper." (Ct. of App. Opin., App. at page 36).

Respondents Bartholomew and the Messenger appealed the ruling of the Tennessee Court of Appeals on the defamation cause of action. Petitioner Ferguson filed a brief in opposition to the appellate brief filed by Respondents. In this brief, Mr. Ferguson discussed the reasons why the Tennessee Court of Appeals decision on that issue was proper. Noting that the Court of Appeals "did not address the issue of whether there was fault on the part of the Defendants" the Petitioner stated that "it is possible that if he is held to be a private figure, Mr. Ferguson at trial may only be required to prove there was enough evidence in the record from which a jury could conclude by a preponderance of the evidence that the Defendants were negligent in

publishing the defamatory statements about him." (Supreme Court Brief, at page 40). In response to the contention by the Defendants that the Court of Appeals should have decided whether the record disclosed actual malice, Petitioner Ferguson stated that "it certainly would be unreasonable to require the Court of Appeals to decide if the proof in the record met the actual malice standard since that issue would become moot should the jury below resolve the disputed facts in a manner that requires a holding that Mr. Ferguson is a private individual." (S.Ct. Brief, at page 41).

Mr. Ferguson once again cited the Harte-Hanks case, to refute the allegations of lack of actual malice made by the Defendants, and went on to "discuss the state of the proof in the trial court in light of the requirements of the actual malice standard." (S.Ct. Brief, at page 42). Initially, Petitioner Ferguson's brief noted that a Plaintiff in a defamation

case "is entitled to prove the subjective state of mind of Defendants by use of circumstantial evidence..." (S.Ct. Brief, at page 44). Petitioner went on to list and discuss the circumstantial evidence which could lead a jury to find actual malice on the part of Respondents Bartholomew and the Messenger. Essentially, these facts and circumstances are identical to those discussed by the Petitioner in its Brief to the Tennesse Court of Appeals, as the Petitioner compared and contrasted the facts which occurred in Harte-Hanks with those of the instant case.

In conclusion, Mr. Ferguson argued that should the Tennessee Supreme Court determine that Mr. Ferguson was a public official, that United States Supreme Court's decision in "Harte-Hanks clearly indicates that the proof in the record is sufficient to conclude as a matter of law that a reasonable jury could find clear and convincing evidence to show that the false and defamatory statements at

issue were made with knowledge of their falsity or with reckless disregard or whether they were false or not." (S.Ct. Brief, at page 77).

The Supreme Court of Tennessee, in an opinion filed on November 30, 1992, reversed the decision of the Court of Appeals and affirmed the trial court's initial granting of summary judgment on the defamation issue. With regard to the defamation issue, the Tennessee Supreme Court came to the conclusion that "the news articles lay the primary responsibility for the unpaid bills at Ferguson's feet." (S.Ct. Opin., App. at page 6). Furthermore, the Supreme Court determined that "the record discloses the inescapable conclusion that Ferguson did not work cooperatively with Bond even though they worked in the same office." (S.Ct. Opin., App. at page 9.) Notwithstanding these conclusions, however, the Tennessee Supreme Court failed to find actual malice on behalf

of Bartholomew although the latter had information indicating that Petitioner Ferguson was not responsible for the failure of the County to pay its bills. Likewise, Respondent Bartholomew was aware of the fact that Treva Bond, the person of fault, was not Mr. Ferguson's secretary, yet he characterized her as such in all articles relating to Ferguson. Nevertheless, the Supreme Court recognized that the Court of Appeals "did not address the trial court's decision that there was insufficient evidence to support a finding of malice." (S.Ct. Opin., App. at page 12).

The Tennessee Supreme Court, unlike the Court of Appeals, did examine both the "actual malice" and "public figure" issues. After briefly discussing each, the Supreme Court concluded that "the evidence in this case requires no further analysis to reach the conclusion that Plaintiff was a public official within the meaning of Article I, § 19 of the Tennessee Constitution and the 1st

Amendment to the United States Constitution." (S.Ct. Opin., App. at page 19). According to the Supreme Court, "the Court of Appeals construed the factual issue too narrowly." The Court went on to find that "whether Ferguson or Bond had the primary duty to prepare the warrants for signature and mail the signed warrants to the vendors, which is the only basic fact disputed, is not determinative of a material issue in this case." (S.Ct. Opin., App. at page 20). Accordingly, the Court concluded that Petitioner Ferguson did have "substantial responsibility for and control over the conduct of the financial affairs of the County, which is an integral part of the government," thereby rendering him a public official. (S.Ct. Opin., App. at page 20).

The Supreme Court failed, however, to make any mention of the evidence supporting a finding of actual malice and did not even mention the Affidavit of Jean Green. Instead,

it relied on the trial court's finding that "there was no material evidence to support a finding of malice." Since the Court of Appeals made no findings with regard to actual malice, the Supreme Court concluded that "the record supports the finding of the trial court on the issue of malice and that decision is affirmed." (S.Ct. Opin., at page 14).

REASONS FOR GRANTING THE WRIT

Because Petitioner Ferguson was not given the opportunity to present evidence at trial from which a jury could find actual malice on behalf of the Respondents, the only evidence in the record which shows actual malice is contained in the affidavits and depositions of those individuals intimately involved with either Mr. Ferguson or the Defendants in some way or the other. Therefore, it was incumbent upon the trial court to view this evidence in a light most favorable to Mr. Ferguson as Respondent to the Motion for Summary Judgment.

Despite this duty, neither the Obion

County Circuit Court, the Tennessee Court of Appeals, or the Tennessee Supreme Court specifically examined the relevant evidence to determine if it was sufficient to avoid the granting of summary judgment.

Therefore, the first issue before this court is whether affidavits and other evidence filed in opposition to a summary judgment, which contained sworn testimony that the Respondents actively desired the removal of Mr. Ferguson from office, are sufficient to present a jury issue of actual malice on behalf of the Respondents. This Court's decision in Harte-Hanks clearly allows a defamation Plaintiff to use such circumstantial evidence to prove the existence of actual malice. The Court of Appeals and the Tennessee Supreme Court never considered evidence the in the record on the actual malice issue. Neither the Tennessee Court of Appeals nor the Supreme Court considered Harte-Hanks and the availability of

circumstantial evidence to prove actual malice. The trial court's analysis of this issue was incorrect as it held there was insufficient proof of actual malice despite the admissions of Bartholomew as to the knowledge he possessed and despite the affidavit of Jean Green.

The trial court, without even mentioning the affidavit of Jean Green, or any of the other proof of actual malice on the part of the Respondents addressed in Mr. Ferguson's 52 legal page Memorandum in Opposition to the Motion, conclusively stated that the record did not show actual malice with convincing clarity. The Tennessee Supreme Court, without any discussion on the proof in the record, merely affirmed that holding.

The second issue before this Court is the holding by the Tennessee Supreme Court that there was no genuine issue of material fact as to whether Mr. Ferguson was a public figure. The Tennessee Court of Appeals was correct in

holding that there were genuine issues as to the scope of Mr. Ferguson's responsibilities. Taken as true, the proof of Mr. Ferguson as respondent to the Motion for Summary Judgment, showed that he merely without discretion accepted bids for county purchases and wrote purchase orders for the lowest bids. Certainly, if Mr. Ferguson had been the Director of the County Finance Department, he would have been a public figure. But, as an employee in the Office of the County Executive that wrote purchase orders, he was not.

These issues were clearly decided by the Tennessee Supreme Court in contradiction to, if not in a total lack of consideration of, the principals set forth by this Court in a long line of First Amendment cases, and most specifically and most recently in the case of Harte-Hanks Communications, Inc. v. Connaughton, 109 S.Ct. 2678 (1989). Mr. Ferguson's livelihood and reputation have been ruined without so much as an opportunity to

prove to a jury that it was intentionally and incorrectly done by Respondent Bartholomew. The granting of this Petition, which would allow a learned and proper application of this Honorable Court's authorities on the issues raised, would prevent this tragedy.

Respectfully Submitted,

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1701\Ap

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PETITION FOR WRIT OF CERTIORARI TO THE TENNESSEE SUPREME COURT

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

CLIFFORD FERGUSON,	)	
	)	
Plaintiff-Appellee,	)	
	)	OBION LAW
v.	)	HONORABLE
	)	DAVID G. HAYES
THE UNION CITY DAILY MESSENGER, INC AND DAVID BARTHOLOMEW,	)	JUDGE
	)	
	)	NO. 02S01-9112-CV-00058
Defendants-Appellants.	)	

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O P I N I O N

JUDGMENT OF COURT OF APPEALS
AFFIRMED IN PART AND REVERSED

IN PART; JUDGMENT OF TRIAL
COURT AFFIRMED. REID, C.J.

This case presents appeals by all parties from the judgment of the Court of Appeals in an action by Clifford Ferguson, a former employee of Obion County, against the Union City Daily Messenger and its editor, David Bartholomew, for defamation, interference with employment, and other charges, in which the trial court granted the defendants' motion for summary judgment on all charges. Ferguson appeals from the decision affirming summary judgment for the defendants on the interference with employment charge, and the defendants appeal the reversal of summary judgment for the defendants on the defamation charge. The record supports the trial court's summary judgment on both charges.

Ferguson was employed by Obion County from 1978 until 1987, during which time he had three different titles, although his duties remained essentially the same throughout his

employment. His original title was Director of Accounts and Budgets and he reported to the County Judge. (The chief executive officer of the county in 1978 was the County Judge. The name of the position later was changed by statute to County Executive.) In 1979, Ferguson's title was changed to Finance Director, and he was responsible to a committee of the County Commission. As Finance Director he employed Vickie Brown Graham as his secretary. In 1983, as the result of litigation initiated by the County Board of Education, the Finance Department was abolished, and he was given the title Purchasing Agent and directed to report again to the County Executive. After Graham's employment with the County ended in 1984, Treva Bond was hired in her position. However, Ferguson described Bond as a "co-employee" rather than his secretary. They worked in the same office.

Ferguson's job description as Purchasing

Agent, his title when the news articles were published, was as follows:

> The Purchasing Agent is the buyer for the County, obtaining the proper equipment, materials, supplies and services needed by the County departments. The Purchasing Agent will prepare solicitations, obtain quotations, conduct competitive bids for purchases and evaluate responses, awarding contracts to those bidders that meet the specifications and are in the est interest of the County. He will also issue and sign purchase orders, sign warrants for the county and the Highway Department, attend meetings, on occasion, that will better communications with the public and that are in the best interest of the public. He will also keep inventory of County property, talk continuously with the citizens of Obion County about the well being of this County and will serve as County Director of TOSHA (Safety) for the County.

The record does not include evidence with regard to each specific duty set forth in the job description but, the proof shows that Ferguson was responsible for obtaining bids for goods and services purchased by the County, choosing the bids to be accepted, placing purchase orders, approving payment after receipt of goods and services, and co-signing warrants issued by the County in

payment of its obligations. Ferguson's responsibility also included presenting bids at open sessions of the Budget Committee or the County Commission before they were sent to prospective suppliers. He admits that he was responsible for all aspects of purchasing goods and services on behalf of the County except the preparation of the warrants for payment.

Payments for goods and services purchased by the County were made by warrants signed by Ferguson and the County Executive. Ferguson testified that Bond was responsible for the preparation of the warrants and for mailing out the signed warrants. The County Executive testified that it was Ferguson's responsibility to see that the County's bills were paid.

The news reports claimed by Ferguson to be defamatory related to the failure of the County to pay its bills when due. While Bond was on maternity leave in 1985, Ferguson

reported to the County Executive that he had found unpaid bills in her desk and complained that Bond was not doing her work. In January, 1987, Ferguson produced unpaid bills which had been due in 1986. The County incurred more than $250 in penalty fees on utility bills because of late payments. Ferguson talked to vendors about unpaid bills, he publicly stated that vendors would not lose County business for complaining about unpaid bills, and he publicly requested vendors to contact him if they were having a problem getting paid. In 1987, the State suspended the County's credit with State agencies because obligations due the State had not been paid. The news articles lay the primary responsibility for the unpaid bills at Ferguson's feet.

Pursuant to the recommendation of a committee of the Commission, appointed to investigate the purchasing of and payment for goods and services on behalf of the county, the position occupied by Ferguson was

abolished and his employment terminated in June, 1987.

Plaintiff asserts that he lost his employment as a result of the news articles alleged to be defamatory. In response to discovery, Ferguson listed several dozen quotes from the newspaper articles which he contends were defamatory. He then stated in summary as follows:

> All of the items mentioned in this response, as well as the entirety of the articles at issue, are slanted to convey an impression that the Plaintiff was responsible for all of the financial problems of the County with regard to paying its bills, when the Defendants knew, or should have known, that the above statements were untrue, and that the Plaintiff was not responsible for the problems, and, in fact, had done all he was empowered and authorized to do to remedy the problems.

The statements alleged to be untrue did not involve any illegal or immoral conduct, but related to Ferguson's authority and the organizational relationship between him, Bond, and the County Executive. The substance of Ferguson's position is that Bond, not he, was

responsible for preparing County warrants. Ferguson assigns as a major discrepancy in the newspaper reporting that he was "the man who writes the checks to keep Obion County going." He contends that even though he was required to co-sign the warrants, Bond was responsible for actually preparing the warrants, and, therefore, the statement was not accurate and was therefore defamatory. References in the news articles to another aspect of this relationship between Ferguson, Bond, and the County Executive are claimed by Ferguson to be inaccurate, and, therefore, defamatory. Those statements were that Ferguson was Director of the Department of Finance and Purchasing and that Bond was his secretary. The inaccuracy claimed is that at that time his title was County Purchasing Agent, not Director of Finance and Purchasing, and that Bond was a "co-employee," not his secretary. Ferguson stated in his deposition that he did not know if Bond was his secretary; however, he

adamantly insists that though Bond "functioned as a secretary," he "never, at any time, admitted" that she was "his secretary." Along the same line, Ferguson insists that his quoted reference to "his office" meant "four walls and a door," not an official responsibility.

The record discloses the inescapable conclusion that Ferguson did not work cooperatively with Bond, even though they work din the same office. The County Executive testified that Ferguson opposed Bond's employment because she was black. Ferguson said he opposed her employment because "there were other people he thought were better qualified."

In response to the County Executive's testimony that it was Ferguson's responsibility to see that the bills were paid because he was in charge of the Department, Ferguson insists that "the record fails to show that Mr. Ferguson was ever advised that

he had any supervisory authority over Mrs. Bond," and "[m]oreover, there is no proof in the record that the defendants were ever told this by [the County Executive] or that they relied on his statement when attributing blame to Mr. Ferguson for failing to insure that the County's bills were paid timely."

Ferguson assets that reference in the articles to him as Purchasing Agent, Director of Finance, Director of Finance and Purchasing, and Director of Finance and Budgeting is evince of a reckless disregard of the truth and constitutes malice. Ferguson insists that the editor's stated belief that Ferguson was responsible for "seeing that the bills were paid" based on the "fact that he authorized payment and signed the checks" did not indicate lack of malice because Bartholomew "never asked County Executive Jarvis or Treva Bond whether they too had the authority to authorize payment." He assets as further evidence of malice the newspaper's

selection of news items. He states that the newspaper's view that "millions of dollars of taxpayers' money was being more properly and efficiently spent than in the past" was "not as newsworthy" as the failure of the County to pay its bills on time and that, on a particular date, an article regarding the County's financial problems was given more space than the allegation that another County employee "had embezzled thousands of dollars" show that the newspaper acted maliciously.

The trial court found that the plaintiff was a public official and that there was no material evidence to support a finding of malice and granted the defendants' motion for summary judgment.

The Court of Appeals affirmed the trial court's summary judgment on all counts except the charge of defamation. The Court of Appeals, upon reviewing the evidence, found there was a

> dispute as to whether Ferguson was responsible for seeing that the

> bills of Obion County were paid. Therefore, there is a genuine issue of fact regarding the scope of Ferguson's responsibilities as Purchasing Agent, which is determinative of his status as a public official under Press, Inc. [v. Verran, 569, S.W.2d 435 (Tenn. 1978].

That court did not address the trial court's decision that there was insufficient evidence to support a finding of malice.

The defendants assert that the Court of Appeals erred in reversing the trial court's award of summary judgment. Their contention is that publication of the news articles and editorials are protected by the First Amendment to the United States constitution and Article I, Section 19 of the Tennessee Constitution. The First Amendment states in pertinent part:

> Congress shall make no law ... abridging the freedom of speech, or of the press. . . .

In New York Times Co. v. Sullivan the United States Supreme Court stated:

> The constitutional guarantees require, we think, a federal rule

> that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" - that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

New York Times Co. v. Sullivan, 376 U.S. 254, 279-280, 84 S. Ct. 701, 726, 11 L.Ed.2d 686, 706 (1964). See also, Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 109 S. Ct. 2678, 2681, 105 L.Ed.2d 562 (1989).

Article I, Section 19 provides in pertinent part:

> That the printing presses shall be free to every person to examine the proceedings of the Legislature; or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty.

The right to publish granted by Article I, Section 19 is subject only to "being

responsible for the abuse of that liberty."

In Press, Inc. v. Verran, the defendants relied upon both the state and federal constitutions for protection in an action for defamation based on certain newspaper articles. In comparing the protection afforded under the state and federal constitutions, this Court stated with reference to Article I, Section 19:

> To the extent of this controversy this is a substantially stronger provision than that contained in the First Amendment to the Federal Constitution ("Congress shall make no law . . . abridging the freedom . . . of the press') in that it is clear and certain, leaving nothing to conjecture and requiring no interpretation, construction or clarification.
>
> Press, Inc. v. Verran, 569 S.W.2d at 442.

That difference in protection afforded, to the extent it may exist, is not material in this case. The Court stated further:

> This mandate of Tennessee's Constitution requires that any infringement upon the "free communication of thoughts" and any stumbling block to the complete freedom of the press "to examine

> [and publish] the proceedings . . . of any branch or officer of the government" is regarded as constitutionally suspect, and at the very threshold there is a presumption against the validity of any such impediment.
>
> But it does not constitutionalize false and malicious defamations, and publishers are answerable for abuse. We equate "abuse of that liberty," as used in our constitution, with the phrase "actual malice" as used in new York Times.

Id.

Under both the state and federal constitutions, the extent to which the right to publish may be limited is dependent upon the status of the person who claims to have been defamed. This Court in Press, Inc. v. Verran adopted Section 580A, Restatement (Second) of Torts (1977) as the standard for judging the defamation of a public official and Section 580b for judging the defamation of a private person. Those standards are as follows:

> Section 580A. Defamation of Public Official or Public Figure. One who publishes a false and defamatory communication concerning a public

official or public figure in regard to his conduct, fitness or role in that capacity is subject to liability, if, but only if, he

(a) knows that the statement is false and that it defames the other person, or

(b) acts in reckless disregard of these matters.

Section 580B. Defamation of Private Person. One who publishes a false and defamatory communication concerning a private person, or concerning a public official or public figure in relation to a purely private matter not affecting his conduct, fitness or role in his public capacity, is subject to liability, if, but only if, he

(a) knows that the statement is false and that it defames the other,

(b) acts in reckless disregard of these matters, or

(c) acts negligently in failing to ascertain them.

569 S.W.2d at 442. With regard to these standards, the Court commented:

> We believe that these standards meet the criteria of our federal and state constitutions and we adopt them as the law of this jurisdiction.

Id. Obviously, the difference in the

standards applicable to public officials and private persons is set forth in Section (c) of 580B. The following rationale stated for the adoption of the Restatement standards in that case is applicable to the case before the Court:

> In adopting these standards, we look to the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." We are guided by our belief that the news media have not only a right but a duty to make searching inquiry into all phases of official conduct and to realistically evaluate and assess the performance of duty by public officials.
>
> Only under the most compelling circumstances should the courts place obstacles in the way of the news media, or muzzle or deter their investigative efforts and reporting, even though the end result may be distasteful, despicable and shorn of all sense of fairness. The right of the news media to criticize official conduct is limited solely to their answerability for actual malice, which means that the publication was made with knowledge of its falsity or with reckless disregard for the truth.
>
> Any other standard would have a chilling effect upon one of the most cherished of all the freedoms

specified in our bill of rights.

Id.

In the case at bar, the news articles obviously dealt with "official conduct," consequently, the first issue is whether the plaintiff was a public official or a private person. In Press, Inc. v. Verran, the Court developed further the criteria for making that determination:

> The occupant of any position in any branch of government who exercises any public function is subject to the New York Times rules as to all conduct in his official capacity or as to any conduct that might adversely affect his fitness for public office, if he has or "appear[s] to the public to have, substantial responsibilities for or control over the conduct of governmental affairs." Rosenblatt, [v. Baer, 383 U.S. 75, 85, 86 S.Ct. 669, 676, 15 L.Ed.2d 597 (1966).].
>
> This does not necessarily apply only to high public position....

Id. at 441. It is a question of law for the court as to whether the plaintiff is a public official within the meaning of the rule stated in New York Times Co. v. Sullivan and adopted

by this Court in Press, Inc. v. Verran. See generally Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499-511, 104 S. Ct. 1949, 1959-65, 80 L.Ed.2d 502 (1983) (discussing "the constitutionally-based rule of independent review" in cases involving restrictions on the freedom of speech).

The evidence in this case requires no further analysis to reach the conclusion that plaintiff was a public official within the meaning of Article I, Section 19 of the Tennessee Constitution and the First Amendment to the United States Constitution. The Court of Appeals construed the factual issue too narrowly. There may be, as stated by that court, a genuine issue of fact regarding the precise scope of Ferguson's responsibilities; however, the responsibilities acknowledged by Ferguson himself establish him as a public official and officer of the government. The right of the press to criticize government and its agents is not bound by the niceties of

titles or the legalistic definition of duties. Ferguson's duties throughout his employment by the County included substantial responsibility with regard to the financial and business affairs of the County. Whether Ferguson or Bond had the primary duty to prepare the warrants for signature and mail the signed warrants to the vendors, which is the only basic fact disputed, is not determinative of a material issue in this case. The efficient management of financial matters is crucial to the proper operation of government. Based on this record, Ferguson appeared to have, and in fact did have, substantial responsibility for an control over the conduct of the financial affairs of the County, which is an integral part of government. Ferguson was, therefore, a public official.

The trial court also found that there was no material evidence to support a finding of malice. The Court of Appeals made no finding with regard to malice on the charge of

defamation. The record supports the finding of the trial court o the issue of malice and that decision is affirmed.

The decision of the Court of Appeals regarding defamation is reversed, and the judgment of the trial court granting summary judgment to the defendants is affirmed.

The judgment of the Court of Appeals regarding interference with employment is affirmed for the reasons stated in the opinion of that court.

The result is that the judgment of the trial court granting summary judgment for the defendants on all counts is affirmed.

Costs are taxed to the plaintiff.

s/Lyle Reid
Lyle Reid, C.J.

Concur:

Drowota, O'Brien, Daughtrey,
and Anderson, JJ.

IN THE COURT OF APPEALS
OF TENNESSEE
WESTERN SECTION AT JACKSON

CLIFFORD FERGUSON,	)	
	)	
Plaintiff/	)	
Appellant,	)	
v.	)	OBION LAW NO.
	)	6437
THE UNION CITY	)	
DAILY MESSENGER,	)	
INC. AND DAVID	)	
BARTHOLOMEW,	)	
	)	
Defendants/	)	
Appellees	)	

From the Circuit Court of Obion County, Tennessee

The Honorable David G. Hayes

Ted M. Hayden, Memphis
Attorney for Plaintiff/Appellant

James M. Glasgow, Union City
Attorney for Defendants/Appellees

Opinion Filed: July 2, 1991

Affirmed in part,
Reversed in part, and
Remanded

HIGHERS, J.

TOMLIN, P.J., W.S. (Concurs)

FARMER, J. (Concurs)

This appeal arises from an action for

defamation, statutory interference with a contractual relationship, common law interference with an employment relationship, and outrageous conduct. The plaintiff, Clifford Ferguson, brought this action against The Union City Daily Messenger, Inc. (The Messenger) and David Bartholomew on January 29, 1988 in the Circuit Court at Obion County. After the parties had taken extensive discovery, the trial court granted the defendants' motion for partial summary judgment regarding the allegation of defamation. Prior to trial, the court granted defendants' motion for summary judgment on the three remaining allegations. Ferguson appeals the trial court's granting of a summary judgment on the first three counts but he does not appeal the summary judgment on the issue of outrageous conduct.

At all times pertinent to this appeal Ferguson was employed by the Obion County Government. Originally, he was hired by the

executive office to work as the Director of Accounts and Budgets. However, after Obion County's adoption of the Financial Management Act, Ferguson was elected by a seven person committee to act as "Finance Director." As Finance Director Ferguson's duties included accepting requisitions, signing purchase orders, taking bids for all departments, and signing all checks. However, pursuant to a suit brought by the School Board, the Financial Management Act was declared unconstitutional and the Finance Department created by the Act was abolished. Although the Financial Management Act had been repealed, Ferguson continued to operate as Finance Director until 1983. In 1983 the Budget Committee placed Ferguson's office, including Ferguson's secretary, under the direction of the County Executive, Mr. Jarvis. With this move came several changes. Ferguson's position was changed from Director of Finance to "Purchasing Agent." As

Purchasing Agent Ferguson was responsible for all of the purchasing procedures of Obion County, but, according to Ferguson, he was not responsible for seeing that the bills of Obion County were paid. Another change was that, in Ferguson's opinion, his secretary became his co-employee such that they were equals and he was not responsible for overseeing her work because they both answered to Jarvis.[1]

Bartholomew was the reporter responsible for covering the Obion County Government for The Messenger. He interviewed Ferguson and published several stories regarding the financial problems of the Obion County Government.

Ferguson brought this action against Bartholomew and The Messenger pursuant to the publishing of numerous stories regarding Obion

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[1]The Budget Committee created the position of Administrative Assistant and transferred the County Executive's secretary to that position, but it not clear whether this position was created for Ferguson's secretary or for someone else working under Jarvis.

County bills going unpaid and holding Ferguson responsible. After these articles were published in The Messenger, Ferguson's position was terminated by the Budget Committee.

Problems with Obion County's bills were first discovered by Ferguson in early 1985. In 1984 Mrs. Graham, who had originally been Ferguson's secretary (turned co-employee), left her job. Jarvis hired Treva Bond to fill the position. Ferguson was never informed of Bond's duties nor whether she was his secretary or co-employee. Ferguson believed that it was Bond's duty to pay the County's bills because he read that among the list of duties in her job description which was prepared for the state auditors. In the summer of 1985 while Bond was on leave of absence, Ferguson discovered some unpaid bills in a file drawer in the office they shared. Ferguson brought the unpaid bills to Jarvis' attention. Again in January 1987 Ferguson

found hidden about the office unpaid bills as well as invoices and checks he had signed. In the same month it was discovered that the credit extended to Obion County by certain state agencies in Nashville had been cut off because an invoice issued to the Obion County sheriff's department had not been paid. The attention of Bartholomew and The Messenger became noticeably focused on Obion County's financial situation when state agencies began refusing Obion County's credit.

Bartholomew began interviewing Ferguson regarding various past due bills, and running articles focusing on the County's nonpayment of bills. In numerous articles Bartholomew referred to Ferguson as the "Director of Finance" rather than Purchasing Agent, "the man who writes the checks to keep Obion County going," and "the man who . . . oversees the bill paying," and he referred to Bond as Ferguson's secretary. On May 22, 1987, Bartholomew ran an article focusing on the

County's nonpayment of utility bills. Immediately thereafter, the Budget Committee appointed a special committee to investigate the problem. In addition, Jarvis dismissed Bond. After an investigation, the special committee recommended that the Finance Department be abolished (apparently overlooking that the Finance Department was abolished after the Financial Management Act was repealed). On May 29, 1987, The Messenger ran an article discussing the special committee's findings and recommendation. The County Commission concurred with the findings of the special committee to abolish the Finance Department and to terminate Ferguson's position as of July 1, 1987.

Ferguson brought this action against Bartholomew and The Messenger alleging defamation, statutory interference with a contractual relationship, common law interference with an employment relationship, and outrageous conduct. The trial court

granted defendants' motion for summary judgment on all issues and Ferguson appeals on three issues. Finding that a genuine issue of material fact exists, we reverse in part and affirm in part.

I. Defamation

In deciding a motion for summary judgment the trial court must review the matter in the light most favorable to the party opposing the motion and must draw all legitimate conclusions of fact therefrom in the opposing party's favor. Graves v. Anchor Wire Corp. of Tennessee, 692 S.W.2d 420 (Tenn. App. 1985) In deciding a motion for summary judgment the trial court searches for a genuine issue of material fact based upon the grounds asserted in the motion, as supported by the record and affidavits supporting or opposing the motion together with legal presumptions, judicially noticed facts, and applicable principles of substantive law. T.R. Civ. P. Rule 56.03; Ferguson v. Tomerlin, 656 S.W.2d 378 (Tenn.

App. 1983). If, upon such such review, the court finds that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law, then summary judgment is proper. Brookins v. The Round Table, Inc., 624 S.W.2d 547 (Tenn. 1981).

The trial court granted the defendants' motion for partial summary judgment finding as a matter of law that Ferguson was a public official and that the evidence presented by Ferguson was not such that a reasonable jury could find actual malice with convincing clarity.

Certain landmark decisions have defined the law of defamation. In order to recover damages for defamation, a public official must prove that the defamatory statement was made with actual malice as set forth in New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). It is a question of law for a court to determine whether the plaintiff in a

defamation suit is a public official within the maning of New York Times. In Rosenblatt v. Baer, 383 U.S. 75 (1966), the Court defined public officials as "those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." Id. at 85. The Court later noted that the category of "public official" does not include all public employees. Hutchinson v. Proxmire, 443 U.S. 111 (1979). The New York Times rule has been extended to public figures as well as public officials. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). In Curtis Publishing Co. the Court defined a public figure as one who has both:

> commanded sufficient continuing public interest and had sufficient access to the means of counter-argument 'to be able to expose through discussion the falsehood and fallacies' of the defamatory statements. (citation omitted)

Id. at 155. Later, in Gertz v. Robert Welch,

Inc., 418 U.S. 323 (1974), the Court stated that one may be designated as public figure based on either of two alternative bases:

> For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves into the forefront of particular public controversies in order to influence the resolution of the issues involved.

Id. at 345. Thus, in determining whether one is a public figure, courts shall look at whether he has achieved fame or notoriety or whether he has become part of a public controversy.

The trial court looked to the case of Press, Inc. v. Verran, 569 S.W.2d 435 (Tenn. 1978) in determining that Ferguson is a public official. The court in Press, Inc. relied heavily on Gertz regarding the issue of public figures and public officials. In Press, Inc. a junior social worker was found to be a

public official. In reaching this finding the court relied on the trial court's finding that the junior social worker was acting as a representative of the Tennessee Department of Human Services and she had the power to have children taken from their parent's custody and to place them in foster homes and to lay down conditions for their return. Id. at 443. The court notes that to those parents, the social worker "was the very epitome of government." Id. at 443.

We distinguish Press, Inc. from the case at bar. In Press, Inc. the court found the junior social worker to be a public official based upon her representative capacity to the public and the fact that her job carried with it "duties and responsibilities affecting the lives, liberty, money or property of a citizen or that may enhance or disrupt his enjoyment of life, his peace and tranquility, or that of his family." Id. at 441. However, in his capacity as Purchasing Agent, Ferguson was not

representative of "the very epitome of government."

One of the issues in dispute is the scope of Ferguson's job. As in any appeal on a motion for summary judgment, we must look only at the facts in favor of the opponent of the motion. See Jones v. Home Indemnity Insurance Co., 651 S.W.2d 213 (Tenn. 1983) Ferguson has stated that as Purchasing Agent, he was responsible for the purchasing procedures of the County. His duties included sending out letters asking for bids, choosing the lowest bid and then sending a purchase order to the appropriate vendor. Ferguson performed his duties by following the purchasing procedures provided in the Tennessee statutes. He also co-signed the checks to pay the bills sent from the vendors. Thus, according to Ferguson's own description of his duties as Purchasing Agent, he had no direct contact with the public nor did his duties enhance or disrupt any citizen's enjoyment of life, peace

and tranquility or that of anyone's family. Ferguson's classification as a public official is largely based on the scope of his responsibilities and his duties as an employee of Obion County.

Upon reviewing the facts we find that there is a dispute as to whether Ferguson was responsible for seeing that the bills of Obion County were paid. Therefore, there is a genuine issue of fact regarding the scope of Ferguson's responsibilities as Purchasing Agent, which is determinative of his status as a public official under Press, Inc. A party to a lawsuit has the right to have all disputed issues fact decided by a jury. McCormic v. Smith, 668 S.W.2d 304 (Tenn. App. 1984). The determination of whether a plaintiff in a defemation suit is a public official within the meaning of New York Times is a question of law. New York Times Co. v. Sullivan, 376 U.S. 254 (1964). In the case sub judice the issue of Ferguson's scope of

responsibilities must be determined before there can be an accurate decision as to whether he is a public official. Ferguson has a right to a jury trial on factual questions involved in legal issues. See Monroe Auto Equipment Co. v. Heckethorn Manufacturing and Supply Co., 214 F.Supp. 704 (W.D. Tenn. 1963) cert. denied 379 U.S. 888 (1964). Therefore, there is a genuine issue as to a material fact regarding the scope of Ferguson's responsibilities and summary judgment is not proper. We reverse and remand this issue to be tried and determined in the court below.

II.

The second issue on which Ferguson appeals is the trial court's granting of defendants' motion for summary judgment on the issues of statutory and common law interference with a contractual relationship. In Tennessee the statute governing interference with a contractual relationship is declaratory of the common law except as to

the amount of damages that may be recovered. Emmco Insurance Co. v. Beacon Mutual Indemnity Co., 204 Tenn. 540, 551, 322 S.W.2d 26, 231 (1959). The statute governing unlawful interference with contracts states:

> 47-50-109. Procurement of Breach of contracts unlawful - Damages.- It shall be unlawful for any person, by inducement, persuasion, misrepresentation, or other means, to induce or procure the breach or violation, refusal or failure to perform any lawful contract by any party thereto; and, in every case where a breach or violation of such contract is so procured, the person so procuring or inducing the same shall be liable in the treble the amount of damages resulting from or incident to the breach of the contract. The party injured by such breach may bring his suit for the breach and for such damages.

The seven elements in a cause of action for procurement of a breach of contract are: 1) there must be a legal contract; 20 the wrongdoer must have known of the existence of the contract; 3) the wrongdoer must have intended to induce the breach of the contract; 4) the wrongdoers must have acted maliciously; 5) the contract must have been breached; 6)

the act complained of must have been the proximate cause of the breach; and 7) the damages must have resulted from the breach. Campbell v. Matlock, 749 S.W.2d 748, 751 (Tenn. App. 1988). The defendants assert that the plaintiff has failed to prove at least two of these elements. The trial court granted defendants' motion for summary judgment regarding statutory interference of a contract on the basis that Ferguson failed to prove that there was any intention on the part of the defendants to induce the breach of Ferguson's employment contract and Ferguson failed to show that the defendants acted maliciously. The trial court also found that the affirmative defense of constitutional privilege did apply in the case sub judice.

First we shall address the issue of whether Ferguson has shown that there is a genuine dispute as to a material fact regarding the defendants' intent to induce a breach of Ferguson's employment contract with

Obion County. In order to prove defendants' intent to induce a breach of Ferguson's employment contract, Ferguson submitted the sworn affidavit of Jean K. Green, who was an employee of The Messenger from 1973-84. While employed by The Messenger, Green worked in the news room with defendant, Bartholomew, and whenever Bartholomew would leave to cover a County Commission meeting he would stop at Green's desk and state that "they are going to fire your friend today," which was a reference to Ferguson. Furthermore, Green states that Bartholomew had only negative things to say about Ferguson and it was Green's understanding that Bartholomew wanted Ferguson removed from office. The fact that it was Green's understanding that Bartholomew wanted Ferguson removed from office puts into controversy the question whether defendant Bartholomew intended to induce the breach of Ferguson's contract.

However, the defendants also assert that

Ferguson has failed to prove that the defendants acted maliciously. Ferguson presents the Green affidavit to prove the defendants' malice, as well. We note that although the Green affidavit may raise some question as to Bartholomew's intent, it does not show that Bartholomew acted maliciously. Looking only at the evidence in favor of Ferguson we find no evidence to support the claim that the defendants acted maliciously, and therefore Ferguson is unable to meet all seven conditions required to prove statutory interference with a contractual relationship. There is no dispute of a material fact regarding this issue and summary judgment is proper.

Because the statute is declaratory of the common law tort of interference with a contract except as to the amount of damages, we find that summary judgment is also proper regarding the allegation of common law interference with a contract.

We remand the issue of defamation to the trial court to be tried before a jury. On all other issues we affirm. Costs on appeal are adjudged against the defendants.

s/_____
HIGHERS, J.

s/_____
TOMLIN, P.J., W.S. (Concurs)

s/_____
FARMER, J. (Concurs)

IN THE SUPREME COURT
OF TENNESSEE
AT JACKSON

CLIFFORD FERGUSON	)	
	)	
Plaintiff-Appellee,	)	
	)	OBION LAW
V.	)	Hon. David G. Hayes, Judge
THE UNION CITY DAILY MESSENGER, INC., AND DAVID BARTHOLOMEW,	)	NO. 02S01-9112-CV-00058
	)	(Obion Law No. 6437)
Defendants-Appellants.	)	

O R D E R

The Court has considered the petition for rehearing filed by the Appellee and is of the opinion that the petition is without merit. Accordingly, the petition to rehear is denied.

PER CURIAM

(Filed January 19, 1993, Jewel Redden, Clerk)

IN THE CIRCUIT COURT
FOR THE TWENTY-SEVENTH
JUDICIAL DISTRICT
OBION COUNTY, TENNESSEE

CLIFFORD FERGUSON	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION NO.
V.	)	6437
	)	
THE UNION CITY DAILY MESSENGER, INC., and DAVID BARTHOLOMEW,	)	
	)	
Defendants.	)	

MOTION FOR SUMMARY JUDGMENT
COURT'S RULING
January 10, 1990

BEFORE: The Honorable David G. Hayes

APPEARANCES:

For the Plaintiff: Mr. Ted M. Hayden
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COURT'S RULING

THE COURT: All Right, gentlemen, I have listened with all due caution to the arguments that have been presented, and I'm ready at this time to state the opinion and findings of the Court.

As we have already established, this matter is before the Court on the Defendant's Motion for a Summary Judgment or a Rule 56 Motion.

The Court has reviewed all of the pleadings in this cause, the amended pleadings that have been filed, the interrogatories, the depositions, the affidavits and all other matters of discovery that have been completed and filed in this cause in the entire voluminous record. As I have indicated, it has been reviewed and examined by the Court.

From this record, the Court finds that the Plaintiff, Mr. Ferguson, served as the purchasing agent for Obion County government. Previous to this, he held a title of Budget

Director and Director of Financing. This is found in Paragraph 1, 5, 6, 7 of the Plaintiff's Complaint.

The further finding of the Court from the statement or rather the affidavit of Robert T. Jarvis, who was at that time serving as the County Executive and the supervising authority over the Plaintiff, the statement of Bob Jarvis being relied upon is,

> "I relied upon Mr. Ferguson to carry out duties and responsibilities of handling purchases as well as some of the other duties in regard to county finances. These duties include paying and settling accounts, preparing and co-signing warrants in payment of county bills and salaries."

The Court further considered the affidavit of the party, William P. Burnett, who has been Chairman of the Budget Committee of Obion County, and find this particular portion of the affidavit of Mr. Burner who states,

> "Mr. Ferguson's duties continue to be substantially the same as those he had while he was Financial Director except that he did not have

> jurisdiction over the Board of Education and was not Chief Financial Officer. He attended most of the budget meetings. At the meetings, he discussed budgetary issues in the contents of the budget with members of the Commission. The kind of work that he did put him in contact with the business people in the area in the buying and the bidding of goods, supplies, machinery and equipment and the payment of bills."

I would further reiterate that these affidavits that the Court is finding from are not being considered for the purpose of disputed issues regarding defamatory material, but rather they are being considered for the limited purpose of the issue of the public official issue.

I further, in the application of the courts of this state in their holding as to what constitutes public officials, primarily the Verran case, Press, Incorporated v. Verran, 569 South West 2nd, 435, it is the Opinion as stated by the Supreme Court of Tennessee,

> "Any position of employment that carries with it duties and

> responsibilities affecting the lives, liberty, money or property of a citizen or that may enhance or disrupt his enjoyment of life, his piece and tranquility or that of his family as a public office within the meaning of the constitutional privilege."

The application of the law to what the Court finds from the facts, it is, therefore, the opinion of this Court from other facts that have been gleaned throughout the entire record in this cause that the Plaintiff, Clifford Ferguson, was a public official.

It is, therefore, to be determined following this from the standards that have been established from the numerous cases in the United States, primarily the Sullivan case and others that the courts of this state have adopted, there must be a determination of the issue, as this Court sees it.

The standard to be applied is whether the Defendants alleged defamatory, or in this case, defamatory, for taking that issue as being truthful. Publication was made either; one, knowing that it was false or; two, made

with reckless disregard of whether it was false or not, this being the standard as this Court sees it, which has been adopted under the cases of the standard of actual malice standard.

From that perspective, this Court is assuming from the review of all the facts of this case for the purpose of this hearing, that all allegations are true if disputed.

This still leaves this Court with the issue as to whether or not the issue of actual malice is a valid and pending issue.

This Court has familiarized itself with all of the forty-seven items of defamatory content and the form of that content and has reviewed those facts and has reviewed those particular allegations.

The Court finds form its obligation and defines its obligation that it is not here to determine why the Defendant Bartholomew failed to do certain acts or why he failed or chose not to draw certain inferences, nor whom the

secretary was whose, as has been referred to, nor is it the duty or function of the Court as it defines it duty not to determine whether in this particular case, as has been alleged, that Clifford Ferguson was the Director of Finance and Purchasing, as has been alleged, or the Purchasing Agent or the County Finance Director.

The issue before this Court is that of actual malice. It is not neither the function of this Court as it sees its duties to determine what editorial space or size should be allocated for various news items in the local newspapers.

After reviewing and making those statements, reviewing the facts of this case, this Court finds, and that is consistent with the allegations and statements of previous Supreme Court Decisions that the courts have held, and this Court subscribes to this same holding, that erroneous statement is inevitable in free debate, and that it must be

protected in the freedoms of expression or to have the breathing space that are needed.

Based upon those findings of fact and statements that I have submitted to you, gentlemen, this Court finds that the evidence is presented as such that a reasonable jury could not find that actual malice has been shown by the Plaintiff with convincing clarity.

Therefore, there being no genuine issue of facts, the Motion for Summary Judgment is granted and this cause is dismissed.

That leaves the issue that was previously raised, and that issue being as to whether or not there was a contractual interference of law with the employment situation between Mr. Ferguson and the County Court.

I would like for that to be addressed if we could at this time. The court will take a ten-minute recess before we begin that.

(Whereupon, a recess was taken 4;10 p.m.-4:15 p.m.)

THE COURT: Be seated, please. I believe that before the last recess, we were back before the Court on the issue and raised by the Summary Judgment response for the Plaintiff as to the contractual interference.

Where are we on that issue? The question, I guess, is whether that is before the Court at this time, and what is the position of the Defendant on this matter?

MR. GLASGOW: If Your Honor please, the position of the Defendants is that Mr. Ferguson testified in his deposition on Page 95, I believe, that he was employed on a day-to-day basis.

We would submit that on that basis, he actually is an employment at will, whether it be that his paychecks come every two weeks or once every month.

On that basis, if Your Honor please, we submit that there would have been no tortious interference with the contract because it would have been left entirely up to those who

were responsible for abolishing that position to take whatever action that they wanted to take.

They did not dismiss Mr. Ferguson, per se. All that the County Commission did was to abolish his position. We submit, if Your Honor please, that that does not amount to a tortious interference with a contract.

There is no proof here that what The Messenger did caused his dismissal or interference with any contract in the sense of the law, although as a result of that and public opinion and all of the other things happened. The result was that the position was abolished.

Mr. Burnett said in his affidavit that after the position was abolished, Mr. Ferguson didn't say anything to him about being employed by the County or in another office in a different position.

We submit that there is no proof here that would show that there was any tortious

interference with the contract.

MR. HAYDEN: Your Honor, I will add a little bit to what I said previously. But let me reiterate once again, nowhere does the motion filed address the other two counts. It only addresses the defamation count. Nowhere in the briefs where there any mention of anything but the defamation count.

In fact, prior to our aborted hearing back in early December, I believe it was, I filed a memorandum in opposition stating that.

This is a Motion for Partial Summary Judgment. We're talking about the defamation count, and that's it. There was never any mention that that was incorrect or that the motion included anything other than the defamation count until I got here today.

We, obviously, under the Rules of Civil Procedure and under the local rules are entitled to respond to motions.

If a motion is somehow converted to something that doesn't say on its paper, we're

entitled to respond to it, but getting past the issue that it's just not before the Court. It hasn't been filed and it's not before the Court.

Let me address substantially what was said by opposing counsel. First of all, when I included that count, in the complaint were those counts. In the Complaint, there are two counts, common law and statutory.

I did some research that shows it doesn't matter that there was a day-to-day employment relationship. There still was a contractual employment relationship that was interfered with.

So, the only fact that I can understand that the Plaintiff -- one fact supporting a Motion for Summary Judgment on two counts of the Complaint is that the Plaintiff was employed on a day-to-day basis.

That's not a genuine fact under the case law, and I, obviously, won't have that with me and I'm not ready to cite it because I had no

idea we're here on this motion.

Then lastly, about abolishing the position, the proof in the record is that no position was abolished because there was no position.

The proof in the record is that it was supposed to get rid of Clifford Ferguson, and that's what happened. So, he was fired. He was fired from a contractual relationship.

And even if it weren't before the court, there's been no proof, facts, law or otherwise to show that they're entitled to be granted a Summary Judgment.

Obviously, in the law under the statute of the common law of Tennessee, there's nothing like actual malice that they can rely on to say: Regardless of what the facts are, we're entitled to Summary Judgment.

So, first of all, it's not before the Court. We weren't ready to hear it and it's not before the Court.

THE COURT: That's a question that I

have: Is it before the Court? Your position is that it is not before the Court; that you are not here to argue that; that you are not prepared to defend that issue.

MR. HAYDEN: No, Your Honor. There's nothing in the record about a Motion for Summary Judgment on those two counts at all. And even if it were, Your Honor, substantially, it just couldn't be granted on the record.

THE COURT: I'm inclined to agree that that matter is not before the Court at this time. We'll have to set that for a Motion for Summary Judgment on that issue.

Do you want to try to schedule it now since this case is set for trial?

MR. HAYDEN: Your Honor, I don't even have my calendar with me. We could probably have a conference call on the telephone or something, but any Motion for Summary Judgment has to be on file thirty days.

THE COURT: I believe that's right.

MR. HAYDEN: We're pushing the trial date right there. Then I'm entitled to "X" days to respond to anything he files. I don't know if we can get it in by the trial date.

I will certainly go back to my office and get my calendar and we can get on a conference call and see if it could be scheduled.

THE COURT: Mr. Glasgow, what do you about that?

MR. GLASGOW: If Your Honor please, I'm amenable to whatever the Court wants to do in that regard. I have three days of depositions set in a medical malpractice case week after next commencing on Monday. They go through Wednesday. Aside from that, I think I can get somebody else in my office to cover on anything else I have.

THE COURT: I tell you what we can do. Maybe we can attempt to get a date. Mr. Hayden, you don't have your calendar here with you?

MR. HAYDEN: I apologize, Your Honor. I

had no idea dates would be an issue here. I thought we had a trial date and that was it.

THE COURT: The only thing we can do is adjourn and attempt to resolve this by a conference call sometime this week. I will be available for the call tomorrow. I have a trial Friday -- Monday is a holiday -- or Tuesday, whichever you think you can do.

MR. HAYDEN: Your Honor, I'm in the Court of Appeals on Tuesday but tomorrow or Friday, I will be available.

THE COURT: After, say, 10 o'clock in the morning?

MR. GLASGOW: If my throat doesn't get the best of me.

THE COURT: I don't have the conference capabilities, so I'm going to have to rely on somebody to set that up.

MR. HAYDEN: We would have those capabilities and would be willing to do it. I'm assuming we're talking about tomorrow.

THE COURT: Tomorrow afternoon.

MR. HAYDEN: Tomorrow afternoon. Yes, Your Honor, I will call both you and opposing counsel separately and make sure everything is alright, and then I will set up the conference call.

THE COURT: That's find. Any other issues remaining other than this matter that we need to set for a later date?

MR. HAYDEN: Not that I can think of, Your Honor.

THE COURT: Okay. Court then stands adjourned.

REPORTER'S CERTIFICATE

STATE OF TENNESSEE)
) ss:
COUNTY OF DYER)

I, Jeannie A. Noles, Certified Court Reporter and Notary Public at Large, with offices in Lewisburg, Tennessee, hereby

certify that I reported the above mentioned Motion for Summary Judgment on the 10th day of January 1990, and that the Court's Ruling was reduced to typewritten form by me, to the best of my skills and abilities, consisting of 14 pages, including this page.

That i am not kin to any of the parties or their respective counsel herein, nor do I have any financial interest, or otherwise interested in the outcome of these proceedings.

I hereunto set my hand and seal.

s:_____
Jeannie A. Noles,
Certified Court Reporter
and Notary Public at Large
My Commission Expires:
1/11/92

IN THE CIRCUIT COURT FOR THE
TWENTY-SEVENTH JUDICIAL DISTRICT
OF TENNESSEE AT UNION CITY

CLIFFORD FERGUSON,	)	
	)	
Plaintiff,	)	CIVIL ACTION NO. 6437
	)	
v.	)	
	)	
THE UNION CITY DAILY MESSENGER, INC., and DAVID BARTHOLOMEW,	)	
	)	
Defendants.	)	

AFFIDAVIT OF JEAN GREEN

STATE OF TENNESSEE)
) ss:
COUNTY OF OBION)

First having been duly sworn, the affiant states and deposes as follows:

1. That I am a resident of South Fulton, Obion County, Tennessee.

2. That I was an employee of the Union City Daily Messenger between approximately September, 1973 and May, 1984.

3. That I was a staff reporter and editor of the Entertainment Page and Farm Page at the time I left the Union City Daily

Messenger in 1984.

4. That during my employment with The Messenger, I worked in the News Room with defendant, David Bartholomew.

5. That whenever Defendant Bartholomew would leave the offices of The Messenger to cover a County Commission Meeting, he would stop by my desk and state in a loud voice that "they are going to fire your friend today," a reference to the Plaintiff, Clifford Ferguson.

6. That from the time that Clifford Ferguson was hired by County Executor T. W. Jones in approximately 1978, David Bartholomew had only negative things to say about Clifford Ferguson.

7. That from my working closely with David Bartholomew, it was clear that he wanted Clifford Ferguson removed from office.

8. That all of the foregoing statements are made of my own personal knowledge.

FURTHER AFFIANT SAITH NOT.

s:\
Jean Green

SWORN TO AND SUBSCRIBED before me this the 6th day of December, 1989.

s:\ (Wyonna Pruitt)
NOTARY PUBLIC

My Commission Expires:

10-12-92

Supreme Court, U.S.
FILED
MAY 12 1992
OFFICE OF THE CLERK

No. 92-1670

In The

Supreme Court of the United States

October Term, 1992

CLIFFORD FERGUSON,

Petitioner,

vs.

THE UNION CITY DAILY MESSENGER, INC. and DAVID BARTHOLOMEW,

Respondents.

On Petition for Writ of Certiorari To The Tennessee Supreme Court

RESPONDENTS' BRIEF IN OPPOSITION

Counsel of Record:

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OR CALL COLLECT (402) 342-2831

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STATEMENT OF THE CASE

The petitioner, Ferguson,[1] filed his complaint in the Circuit Court of Obion County, Tennessee, against the Union City Daily Messenger, Inc.,[2] a newspaper, and David Bartholomew, one of its reporters and later its editor.

The complaint was cast in four counts. First, he alleged statutory interference with a contractual relationship. Section 47-50-109, Tennessee Code Annotated. In the second count, he pleaded common law interference with employment and intentional interference with an advantageous relationship. The third count charged defamation. Outrageous conduct was averred in the fourth count.

The Trial Court entered summary judgment on all counts.

In the Tennessee Court of Appeals, the petitioner presented for review the Trial Court's action in granting summary judgment as to counts one and two of the complaint dealing with statutory and common law interference with a contractual relationship and count three

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[1] The petitioner, Clifford Ferguson, was the plaintiff in the Trial Court and will sometimes be referred to as petitioner or Ferguson. The respondents, Union City Daily Messenger, Inc. and David Bartholomew, were defendants in the Trial Court and will sometimes be referred to as "Messenger" and "Bartholomew" respectively, or as respondents.

[2] The Union City Daily Messenger, Inc. has no parent nor subsidiary company.

alleging defamation. The petitioner did not appeal count four dealing with outrageous conduct.

The State Court of Appeals affirmed the Trial Court in granting summary judgment on the statutory and common law interference with contract counts and reversed on the defamation count.

The respondents were granted permission by the Tennessee Supreme Court to appeal on the defamation count.

The Supreme Court affirmed the judgment of the Court of Appeals in granting summary judgment on interference with employment counts for the reasons stated in the opinion of the intermediate court. The State Supreme Court reversed the decision of the Court of Appeals on the defamation count and affirmed the Trial Court in granting summary judgment on all counts and dismissing the complaint.

The petitioner described himself in the complaint as the purchasing agent for Obion County Government, although he had other titles from the time of his employment in October of 1978. Nowhere in his complaint did the petitioner allege that he filed his action as a private citizen and that he was not a public figure or a public officer. He sought damages based upon his alleged common law rights, with the exception of the statutory interference with a contractual relationship, Section 47-50-109, Tennessee Code Annotated.

In their amended answer, the defendants placed in issue all of the essential allegations in the complaint.[3] They affirmatively pleaded that the articles published in the respondent, Messenger, were about a public figure and were true and highly newsworthy. They also defended on the ground that the articles were substantially true and were published without malice. The respondents affirmatively pleaded that the publications were made without either malice or actual malice and were constitutionally protected under the First Amendment to the Constitution of the United States and Article I, Section 19, of the Constitution of Tennessee.

STATE COURT DECISIONS

In dismissing the defamation count, the Trial Court discussed *New York Times Company v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) and *Press, Inc. v. Verran*, 569 S.W.2d 435 (Tenn. 1978). The Trial Judge stated that the issue before the Court was whether there was actual malice and it was not the function of the Court " . . . to determine what editorial space or size should be allocated for various news items in the local newspapers", and that " . . . erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the breathing space that are needed".

[3] The amended answer was lengthy and pleaded numerous denials and defenses.

The State Court of Appeals found, upon its review of the facts, that there was a disputed factual issue regarding the scope of Ferguson's responsibilities as purchasing agent which was determinative of his status as a public official. The Court reasoned that Ferguson had a right to a jury trial on factual questions involving legal issues in spite of recognizing that, under the *New York Times* doctrine, the determination of whether the petitioner was a public official is a question of law. Consequently, the State Court of Appeals concluded that the Trial Judge should not have granted summary judgment and reversed for a trial on the merits to have a jury decide the duties of Ferguson and whether he was a public official. The decision of the Appeals Court holding that a jury should decide whether Ferguson was a public official was obviously erroneous.

The State Court of Appeals also discussed the petitioner's theories of statutory and common law interference with a contractual relationship. The seven elements which are required in an action for procurement of a breach of contract were enumerated.[4] Among the essential elements is the requirement that the alleged wrongdoers must have acted maliciously. In this connection, the Court discussed the affidavit of Jean K. Green which is relied upon heavily by the petitioner. The Court of Appeals found that there was an issue based upon

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[4] *Emmco Insurance Company v. Beacon Mutual Indemnity Company*, 204 Tenn. 540, 551, 322 S.W.2d 226, 231 (1959); and *Campbell v. Matlock*, 749 S.W.2d 748, 751 (Tenn.App. 1988) set forth specifically the seven mandatory elements required in those actions.

Green's affidavit as to whether Bartholomew intended to induce the breach of Ferguson's contract but the affidavit did not show malice. On the issue of malice, the Court said:

> "We note that although the Green affidavit may raise some question as to Bartholomew's intent, it does not show that Bartholomew acted maliciously."

Consequently, there was a concurrent finding of the Trial Court and the Court of Appeals that there is not any proof of malice.

The State Supreme Court reversed the State Court of Appeals holding that it was a question of law for the Court to decide as to whether the petitioner was a public official within the meaning of *New York Times Company v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) and *Press, Inc. v. Verran*, 569 S.W.2d 435 (Tenn. 1978). In disposing of the issue, the Court declared:

> "The evidence in this case requires no further analysis to reach the conclusion that plaintiff was a public official within the meaning of Article 1, Section 19, of the Tennessee Constitution and the First Amendment to the United States Constitution. The Court of Appeals construed the factual issue too narrowly. There may be, as stated by that Court, a genuine issue of fact regarding the precise scope of Ferguson's responsibilities; however, the responsibilities acknowledged by Ferguson himself establish him as a public official and officer of the government. The right of the press to criticize government and its agents is not bound by the

> niceties of titles or the legalistic definition of duties."

The Tennessee Supreme Court went on to hold that the disputed fact about the scope of Ferguson's duties was not determinative. Whether Ferguson had the primary duty to prepare warrants for signature and mail the signed warrants to the vendors was not a crucial issue. The Court reasoned:

> "The efficient management of financial matters is crucial to the proper operation of government. Based upon the record, Ferguson appeared to have, and in fact did have, substantial responsibility for control over the conduct of the financial affairs of the county, which is an integral part of government. Ferguson was, therefore, a public official."

The State Supreme Court in reaching its decision relied upon the First Amendment of the Constitution of the United States; Article I, Section 19, Constitution of Tennessee; and *Press, Inc. v. Verran*, 569 S.W.2d 435 (Tenn. 1978).

Article I, Section 19 of the Tennessee Constitution declares:

> "That the printing presses shall be free to every person to examine the proceedings of the Legislature; or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty. But in

> prosecutions for the publication of papers investigating the official conduct of officers, or men in public capacity, the truth thereof may be given in evidence; and in all indictments for libel, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other criminal cases."

As a matter of state law, the State Supreme Court has construed Section 19 in *Press, Inc. v. Verran*, as providing greater protection than the First Amendment to the Constitution of the United States. For that reason, a field welfare worker was held to be a public official because the worker had the power to take action to cause children to be taken from their parents.

In *Press, Inc. v. Verran*, the Court described who is a public official under state law and asserted:

> "While the term 'public official' has not been defined with precision, it causes us no particular concern. Generally the title and nature of the office will provide the answer. However, we find nothing magical, mysterious or mystical in the terminology. The occupant of any position in any branch of government who exercises any public function is subject to the *New York Times* rule as to all conduct in his official capacity or as to any conduct that might adversely affect his fitness for public office, if he has or 'appear(s) to the public to have, substantial responsibilities for or control over the conduct of governmental affairs.' *Rosenblatt*, supra.
>
> This does not necessarily apply only to high public position. Any position of employment that carries with it duties and responsibilities affecting the lives, liberty, money or property of

> a citizen or that may enhance or disrupt his enjoyment of life, his peace and tranquility, or that of his family, is a public office within the meaning of the constitutional privilege."

Relying on that decision, the Tennessee Supreme Court held that Ferguson was a public official within the meaning of Article I, Section 19 of the Constitution of Tennessee, and the First Amendment of the Constitution of the United States. The Court reasoned that (1) the responsibilities acknowledged by Ferguson himself establish him as a public official and officer of the government; (2) Ferguson's duties throughout his employment by the county included substantial responsibility with regard to the financial and business affairs of the county;[5] (3) the

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[5] Ferguson prepared his job description which states: "The purchasing agent is the buyer for the County, obtaining the proper equipment, materials, supplies and services needed by the County departments. The Purchasing Agent will prepare solicitations, obtain quotations, conduct competitive bids for purchase and evaluate responses, awarding contracts to those bidders that meet the specifications and are in the best interest of the County. He will also issue and sign purchase orders, sign warrants for the County and the Highway Department, attend meetings, on occasion, that will better communications with the public and that are in the best interest of the public. He will also keep inventory of County property, talk continuously with the citizens of Obion County about the well being of this County and will serve as County Director of TOSHA (Safety) for the County." (Bartholomew Deposition, Volume 1, p. 303, Exhibit 31) He testified that he signed county warrants in payment of county bills as "Director of Finance". (Ferguson Deposition, pp. 186-188) He also testified that he was accurately quoted in the

efficient management of financial matters is crucial to the operation of government; and (4) Ferguson, according to the record, had substantial responsibility and control over the financial affairs of the county, which is an integral part of government. It is clear that he was properly characterized as a public official under the First Amendment of the Constitution of the United States. In addition, he was a public official under the Tennessee Constitution which is broader than the federal constitution, and, therefore, the decision of the State Supreme Court rests upon an adequate state ground. *Black v. Cutter Laboratories*, 351 U.S. 292, 76 S.Ct. 824, 100 L.Ed. 1188 (1956); *Enterprise Irrigating District v. Farmers Mutual Canal Company*, 243 U.S. 157, 37 S.Ct. 318, 61 L.Ed. 644 (1917). All of the foregoing warrant the dismissal of the petition because the petitioner was a public officer within the meaning of the federal and state constitutions.

ABSENCE OF MALICE

One of the principal arguments of the petitioner is that the State Supreme Court did not discuss actual

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Messenger stating: "When we get the bills in this office, we pay them." (Ferguson Deposition, pp. 146-147)
He regularly attended budget committee meetings of the County Commission from the time he was hired and participated in discussions about the budget. The meetings were held in the Juvenile Courtroom or in petitioner's office. (Affidavit of Ferguson, Transcript, Volume 2, p. 123; Affidavit of Ferguson, Transcript, Volume 3, p. 137; Affidavit of Burnett, Transcript, Volume 3, p. 63; Affidavit of Puckett, Transcript, Volume 3, p. 102)

malice. This insistence is bottomed on the affidavit of Jean K. Green.[6]

Both the Trial Court and Court of Appeals considered the entire record and the Appeals Court specifically discussed the affidavit. Both Courts found that common law malice was not established and an essential ingredient of the petitioner's claims for statutory and common interference with petitioner's employment contract was absent. These holdings constituted a current finding of fact which is not reviewable under state law. However, if there was any doubt about an absence of common law malice, the State Supreme Court put this issue to rest by affirming the judgment of the Court of Appeals on the issue of " . . . interference with employment . . . for the reasons stated in the opinion of that Court." (Petitioner's Appendix, p. 21)

In the absence of malice, there could not be "actual malice" as required by *New York Times Company v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). In the public official cases, the expanded rule of constitutional malice is that the publication was made with knowledge " . . . that it was false or with reckless disregard of whether it was false or not". This Court in a number of cases has clarified what is meant by falsity and publications recklessly made.

The proof in this case falls far short of actual malice. The argument of the petitioner has two basic thrusts. First, he insists that he was identified by incorrect titles

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[6] The affidavit is copied in the petitioner's appendix, pp. 61-63.

and as the person responsible for paying the county's bills. Secondly, the affidavit of Green is proof of actual malice. In the context of the proof in this case, the State Supreme Court said that the press " . . . is not bound by the niceties of titles or the legalistic definition of duties," and reasoned that it must take the broad view of evidence from undisputed material facts, as previously discussed.

As to the Green affidavit, the Court dealt with it by adopting the reasons given by the Court of Appeals in holding that "it may raise some question of intent" but it does not prove malice, and based on that finding, the State Supreme Court had no reason to discuss actual malice which is much more than common law malice from which this Court departed in *New York Times Company v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989).

At the most, it might be said, which the respondents deny, that there was negligence in Bartholomew's reporting. Negligence or reasonableness is not the test as decided in *New York Times*. Even reckless conduct is not measured by what a reasonably prudent man would have published or would have investigated before publishing. *St. Amant v. Thompson*, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968).

For those reasons, the State Supreme Court had no need to discuss actual malice.

STATEMENTS IN PETITION

The respondent will address some of the statements made by the petitioner in his "Statement of Case".[7]

A. He argues that the petitioner hired Ms. Graham to be his secretary, but he did not hire Ms. Bond and she was not his secretary. (Petition for Certiorari, pp. 11-13) He placed substantial reliance on his job description in support of his argument that Ms. Bond was not his secretary. The same exhibit which was filed containing the petitioner's job description also sets forth that of Ms. Bond's. It reads:

> *"Secretary to Purchasing Department*
>
> The Secretary to the Purchasing Department will perform general office duties such as typing, filing and answering the phone. The Secretary will prepare and issue payroll warrants, will issue purchase orders and complete purchase orders, will prepare and mail warrants to pay purchase orders for goods received, total and receipt all warrants received from the Trustee's office at the end of each month, and prepare requests for bids on purchases, when required by law." (Bartholomew Deposition, Volume 1, p. 303, Exhibit 31)

As everyone in the courthouse and the public knew, Ms. Bond was the secretary in the purchasing department as shown by her job description. The job descriptions do

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[7] The petitioner has generally made statements of fact which may not be exactly accurate and the respondents will comment on some of them, but will not make a detailed statement of facts. A response is being made only as considered reasonably necessary to respond to the petition.

not support his disavowals. Her job description also answers the petitioner's contentions that Bond was a co-employee and that he only knew of her duties when he read her job description. His own testimony refutes these arguments.

B. The petitioner states that Bartholomew held himself out as the eyes and ears of Obion County government. The statement is inaccurate because he testified that he and other reporters tried to inform the Messenger's readers of "what went on in the county government of Obion County".[8] This was a promotion printed on a card displayed on the front of the Messenger's newspaper racks.

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[8] His deposition reads:

"Q. Mr. Bartholomew, did you generally hold yourself out as the eyes and ears of Obion County people and county government?

A. I think the readership of the *Union City Daily Messenger* looked to the *Union City Daily Messenger,* including myself and other reporters, to tell them what went on in the county government of Obion County.

Q. Did you not actively promote yourself as being the eyes and ears of Obion County citizens and county government?

A. That was a promotion that ran on a rack card on the front of a newspaper rack.

Q. And, when did that run?

A. I don't know when that was created.

Q. Do you recall how long it ran?

A. No. I'm sure it ran intermittently until probably the first of September when I left the *Messenger* from the time it started.

C. The petitioner portrays Bartholomew as being intimately familiar with the county's budgets. (Petition for Certiorari, p. 18) When asked if he ever saw an Obion County budget, Bartholomew testified that he looked at totals to see whether there were any significant line item changes.[9] His testimony indicates some familiarity with county budgets but not that he was intimately familiar with them.

Q. And, you don't recall when it started.
A. No, I don't. It was one of several such promotional items about various people on the staff that ran in rotation on various racks.
Q. But, in fact, county government was your beat.
A. Basically, yes, sir.
Q. And, you felt it was your obligation to keep the citizens informed as to what was going on in county government.
A. Yes, sir; I did. I think that's the obligation of any journalist." (Bartholomew Deposition, Volume 1, pp. 179-180)

[9] The deposition of Bartholomew recites:
"Q. Did you ever see a copy of an Obion County budget?
A. I did.
Q. And, did you ever sit down and read a copy of the budget of Obion County?
A. Probably not every word of it, no; I looked at it.
Q. All right. Tell me, every year, did you make it a practice of at least seeing or reading a copy of the budget of Obion County?
A. After I began to cover county government on a regular basis, yes.
Q. All right. And, you stated you didn't read every word of it. What was your practice with regard to reading the budgets?

D. The petitioner also complains about Bartholomew telling him, after the sheriff was reprimanded for buying for his departments without submitting a purchase order, "Well, you have won another one." It is difficult to understand why the petitioner considers the statement is significant unless it is to show that Bartholomew was praising the petitioner for doing his job.

E. The chair of the committee which investigated Ferguson stated that he had done nothing wrong in his job performance. (Petitioner for certiorari, p. 25) The statement fails to include her concern about the two signatures which appeared on county warrants (checks).[10] The warrants were signed by the County Executive and the Director of Finance, i.e., namely the County

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A. Normally, I just looked at totals and see if there were any significant line item changes.
Q. In looking to see if there were any significant line item changes, would you look at every page or every department?
A. Normally." (Bartholomew Deposition, p. 259)

[10] The petitioner testified, in part, as follows:
"Q. And why did you attend the meeting, if you knew what they were going to do?
A. I just wanted to be there to see what they had to say.
Q. All right.
A. And to defend my position.
Q. All right. What did you do in defense of your position?
A. I told them that they had not found one thing wrong with my job performance, and Jean Cohen agreed, but she said, there's two signatures on the checks, and neither of which is Treva's." (Ferguson Deposition, pp. 77-78)

Executive, Robert Jarvis, and Director of Finance, Clifford Ferguson."

F. The petitioner erroneously states that his original complaint, ". . . specifically pled the actual malice requirement as enunciated by this Court in *New York Times Company v. Sullivan*, 376 U.S. 254 (1964)". (Petition for Certiorari, pp. 27-28). The complaint is lengthy but it does not contain any allegation concerning actual malice nor does it cite or refer to *New York Times*. The respondents defended on the grounds that the publications were constitutionally privileged by the First Amendment of the Constitution of the United States and Article I, Section 19, of the Constitution of Tennessee. Neither party pleaded the Fourteenth Amendment.

The opinions of the State Courts have set forth the salient material facts gleaned from the depositions and affidavits. They are relied upon by the respondents, although many of them are conclusory. The State Supreme Court did not consider the petitioner's affidavits and deposition only but weighed all of the facts in the manner required by *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

RESPONSE TO ARGUMENT

The petitioner states that this Court should grant certiorari and hold that (1) a jury issue is presented on actual malice, or (2) the petitioner is not a public figure (official).

He seeks the writ, relying upon *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989) and *Bose Corporation v. Consumers Union of United States, Inc.*, 692 F.2d 189, 1st Cir., 1982 affirm., 466 U.S. 493, 80 L.Ed.2d 502 (1984).

Harte-Hanks, according to the petitioner, stands for exploring the publisher's state of mind by circumstantial evidence. His contention is that Bartholomew's state of mind is reflected by his failure to check his news articles from documentation readily available to him. His hypotheses is that additional investigation by Bartholomew would have shown that the petitioner was not at fault for the nonpayment of the county's bills. As a result of interviews in late May, 1987, Ferguson allegedly told Bartholomew of his version of the true facts but they were not published. The petitioner states that for these reasons, the Court should find actual malice and order a jury trial.

The decisions of this Court and the State Supreme Court are not so shallow.

The factual scenario in this case differs dramatically from those in *Harte-Hanks*. That case dealt with scheming in a political campaign in which the plaintiff, Connaughton, allegedly participated in "dirty tricks" by offering a job and other benefits to a grand jury witness for her assistance in an investigation. The appeal was from a jury verdict in favor of Connaughton.

In the case at bar, there is nothing which can be said to be "dirty tricks". The gist of Bartholomew's articles was substantially true. Thus, it cannot be maintained that the articles contained the requisite falsity under the *New*

York Times doctrine. There is no showing of any degree of culpability in this case. The worst that can be said is that Bartholomew's research could have possibly been more carefully done. This may possibly be negligence but it is not actual malice.

If the underlying tenet of Ferguson's claim is understood, he insists that *Harte-Hanks* required the Court to accept everything Ferguson said in their conversation as true and Bartholomew should have accepted the petitioner's version and ended an important series of articles about the county's nonpayment of its bills and the petitioner's accountability in handling the county's finances.

The Supreme Court of Tennessee correctly characterized the evidence, as it had the duty to do, declaring that the Trial Court was correct in finding that the evidence did not show "malice".

The petitioner also relies upon *Bose Corporation v. Consumers Union of United States, Inc.*, 692 F.2d 189 (1st Cir., 1982), affirm., 466 U.S. 493, 80 L.Ed.2d 502 (1984). In that case, the Circuit Court of Appeals reversed the judgment of the District Court where damages were assessed. The case was appealed to this Court and the decision of the First Circuit was affirmed. Significantly, this Court did not adopt the reasoning of the Court of Appeals.

This Court found in *Bose*, as it should in this case, " . . . that there is a significant difference between proof of actual malice and mere proof of falsity, and (2) that such additional proof is lacking in this case."

If the theory of the petitioner were adopted, the risk of undue self-censorship and the suppression of truthful

material would be imposed upon the media in the area of reporting upon public affairs. That result is unacceptable in our society.

The facts in this case differ substantially from those in *Harte-Hanks* and *Bose*, although the rationale of the latter may be held to apply here because this Court found that there was no proof of actual malice.

Secondly, the petitioner also complains that the Supreme Court of Tennessee should have held that the petitioner is not a public official. As previously stated, the State Supreme Court relied heavily upon *Press, Inc. v. Verran*, 569 S.W.2d 435 (Tenn. 1978) where the Court said the case " . . . developed further the criteria" for making the determination of who is a public official. *Press, Inc.* states that Article I, Section 19, of the Tennessee Constitution is broader than the First Amendment of the Constitution of the United States, but the Court did not find it necessary to discuss the " . . . difference of protection afforded, to the extent it may exist". In holding that a junior social worker in the local county office of human services was a public official, the Court announced that the test is not where the person fits in the hierarchy of public officials, and irrespective of her " . . . rather low" rank, she was a public official within the meaning of the state's libel law.

In reaching its conclusion in *Press, Inc.*, the Court relied upon the reasoning of the line of cases generated by *New York Times*. The *Press, Inc.*, decision clearly adopts and expands the federal rule in defining who is a public officer within the meaning of state libel law. In giving its definition of a public officer, the State Court said that it is

a person in any position of public employment " . . . that carries with it duties and responsibilities affecting the lives, liberty, money or property of a citizen or that may enhance or disrupt his enjoyment of life, his peace and tranquility, or that of his family . . . ". Certainly, Ferguson's duties and responsibilities fell squarely within that definition. Strangely, the petitioner does not cite any case in support of his contention that he was not a public officer.

The petitioner has failed to cite any authority which actually supports his reasons for seeking the writ of certiorari to review the facts in this case.

The State Supreme Court has performed its duty by studying the record made in the Trial Court and deciding as a matter of law that the facts do not establish actual malice and that the petitioner was a public official.

The Trial Court properly found that the clear-and-convincing requirement must be considered in ruling on the motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Essentially, some of the same factual claims were advanced against Liberty Lobby as are made in this case. The complaint charged numerous inaccuracies and that there had been a failure to verify adequately information.[11] Tennessee's highest Court weighed all of the evidence and found malice lacking. It follows that there

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[11] It was also alleged that some of the sources of the articles " . . . were patently unreliable" in *Liberty Lobby*.

could not be any basis or reason for a jury trial as to actual malice.

In discussing *Liberty Lobby* in a very recent case, the Tennessee Supreme Court adopted its reasoning. *Byrd v. Hall*, 847 S.W.2d 208 (Tenn. 1993).[12] The case reiterates the rule " . . . that the mere existence of *some* alleged factual dispute between the parties would not defeat a motion for summary judgment".

Accordingly, the State Supreme Court applied the appropriate evidentiary standard in affirming the Trial Court's entry of summary judgment.

CONCLUSION

In conclusion, this Court should deny the petition for certiorari and/or dismiss this action.

Respectfully submitted,

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[12] The Court granted the appeal in *Byrd* " . . . to establish a clearer and more coherent summary judgment jurisprudence."

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NO. 92-1670

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

CLIFFORD FERGUSON, Petitioner

v

THE UNION CITY DAILY MESSENGER and
DAVID BARTHOLOMEW, Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE
TENNESSEE SUPREME COURT

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

I. CONSTITUTIONAL INTERPRETATION ISSUE

In their Brief In Opposition to Clifford Ferguson's Petition for Writ of Certiorari, the Respondents allege that the Tennessee Supreme Court has "construed Section 19 . . . "as providing greater protection than the First Amendment to the Constitution of the United States." (Respondents' Brief In Opposition, at page 7). Moreover, Respondents also alleged that Section 19 is "broader than the Federal Constitution...," and therefore contend that the decision of the State Supreme Court rests upon an adequate State ground. (Respondents' Brief In Opposition, at page 9). The Respondents are incorrect, since the Tennessee Supreme Court has clearly stated that the protection to the press granted by Article I, Section 19 of the Tennessee Constitution is coextensive with the protection granted by the First Amendment.

There is thus no independent state ground underpinning the result reached by the State Supreme Court, but there is merely its misapplication of this Court's First Amendment authorities.

The only case cited by Respondents allegedly supporting their contentions is Press, Incorporated v. Verran, 569 S.W.2d 435 (Tenn. 1978), wherein the Tennessee Supreme Court was faced with determining whether the plaintiff, a junior social worker, was to be considered a "public figure" or "public official" for purposes of the First Amendment.

At the outset, the Verran Court noted that the Supreme Court of the United States "has constitutionalized the law of libel and, in material particulars, has preempted state statutory and decisional law in cases and controversies involving the communications media." Id. at 440. Keeping this fact in mind, the Verran court examined the Supreme Court decisions which established the

aforementioned libel law, and its relationship to the United States and Tennessee Constitutions. Specifically the court discussed New York Times Company v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), in which the Court established a new rule of "constitutional privilege," which requires a public official suing for damages for a defamatory falsehood to prove that the defamatory statement was made with "actual malice - that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-280, 84 S. Ct. at 726, 11 L.Ed.2d at 706.

Contrary to the assertions made by the Respondents in their Brief In Opposition, the Tennessee Supreme Court in Verran did not construe Section 19, of Article I of the Tennessee Constitution as providing greater protection than the First Amendment to the Constitution of the United States. The Respondents' selective quotations from the

case fail to accurately state the true holding of the Court in Verran. Essentially, the Court did not construe Section 19 as being broader than the First Amendment, but rather it ruled that the Tennessee provision was "substantially stronger" than the First Amendment "in that it is clear and certain, leaving nothing to conjecture and requiring no interpretation, construction or clarification." Id. at 442. Although more detailed and precise than the First Amendment, the Verran Court nonetheless held that Section 19, Article I's "abuse of that liberty" language is to be equated with the "actual malice" standard established by the Supreme Court in New York Times v. Sullivan. The Verran Court therefore held that in Tennessee, "the right of the news media to criticize official conduct is limited solely to their answerability for actual malice, which means that the publication was made with knowledge of its falsity, or reckless disregard for the

truth." Id. See also; Windsor v. Tennessean, 654 S.W.2d 680, 683-84 (Tenn. Ct. App. 1983).

It is evident from the decision in Verran that the Tennessee Supreme Court was attempting to fashion Tennessee's libel law in a manner which was consistent with the United States Supreme Court decision in New York Times v. Sullivan. It follows that the "actual malice" standard will govern any "public figure" defamation action, regardless of whether the United States or Tennessee Constitution applies. Respondents' contention that the Tennessee Constitution provides more protection than the First Amendment is therefore without merit.

II. ACTUAL MALICE ISSUE

Another issue first raised by the Respondents in their Brief in Opposition is the assertion that the lower court's failure to find common law malice similarly precluded a finding of New York Times "actual malice." The Respondents contend that "(i)n the absence

of malice, there could not be 'actual malice'as required by New York Times Co. v. Sullivan." (Respondents' Brief in Opposition, at page 10). Since common law malice was not proven in the lower courts, allege the Respondents, "the State Supreme Court had no reason to discuss actual malice which is much more than common law malice from which this Court departed in New York Times." (Respondents Brief in Opposition, at page 11). Accordingly, Respondents use this faulty reasoning to conclude that "the State Supreme Court had no need to discuss actual malice." (Respondents' Brief in Opposition, at page 11.)

Throughout the evolution of this case, not one court has ever considered whether the Respondents published the defamatory statements with "actual malice." Although Respondents seek to analogize common law malice with "actual malice," they fail to recognize that these two theories are

independent of each other, especially in the context of the case at bar.

Petitioner sued Respondents not only for defamation, but for statutory and common law interference with contract as well. As noted by the Tennessee Court of Appeals, an action for procurement of a breach of contract has seven elements, most notably that "the wrongdoer must have acted maliciously." Campbell v. Matlock, 749 S.W.2d 748, 751 (Tenn. Ct.App. 1988). As correctly stated by Respondents, the Court of Appeals did conclude that "Ferguson failed to show that the defendants acted maliciously." (Tenn. Ct. App. Decision, at page 8). What the Respondents failed to point out to this Court is that the failure to find malice related only to the procurement of breach claim and its requirement of ill will or common law malice, not the defamation claim and its requirement of actual malice. The only action taken by the Court of Appeals concerning the

defamation issue was to remand the case to determine whether Petitioner was even a "public figure," and was therefore required to prove actual malice.

The fact that New York Times actual malice is separate and apart from the typical common law malice needed to prove claims such as procurement of breach is axiomatic to this Court. While one form of malice contemplates "(t)he intent, without just cause or reason, to commit an unlawful act that will result in injury to another," the other form was judicially created by this Court in New York Times. The American Heritage Dictionary, p.759 (2d. ed. 1985). "Actual malice," as used in the defamation - public figure context, involves defamatory statements made "with knowledge that it was false or with reckless disregard of whether it was false or not. " New York Times, 376 U.S. at 279-80.

It is evident that common law malice shares little in common with New York Times

"actual malice." The latter is only applicable in a select and narrow group of cases, while common law malice may be an essential element of any number of causes of action. The only form of malice ever found to be lacking in this case was common law malice, not "actual malice." Because the Court of Appeals remanded the case to determine whether the "actual malice" standard should even apply, it follows that no court has ever applied the "actual malice" standard to the instant case. Although the Tennessee Supreme Court did find that petitioner was a public figure and subject to the "actual malice" test, it nonetheless failed to apply this test. Rather, it simply relied on the findings of the lower Court and summarily concluded that since the defamation was not made with common law malice, it could not be made with "actual malice." As seen from the argument above, this reasoning is both faulty and inconsistent with the standards

established in New York Times. For these reasons, the Petitioner respectfully requests that his Petition be granted.

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